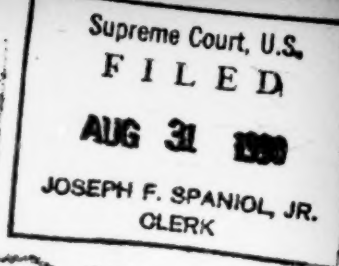


90-377

No. \_\_\_\_\_



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

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LINDA MORRISON and  
JOHN FAMULARO and  
JOHN FUND and  
RICHARD BROGLINO and  
STUART KESSLER,  
on their own behalf and  
on behalf of all others  
similarly situated,  
Petitioners

vs.

THE PENNSYLVANIA CONVENTION  
CENTER AUTHORITY and  
THE CITY OF PHILADELPHIA  
Respondents

---

ON PETITION FOR WRIT OF CERTIORARI TO  
THE PENNSYLVANIA COMMONWEALTH COURT

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PETITION FOR WRIT OF CERTIORARI  
AND APPENDIX

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## **QUESTIONS PRESENTED**

1. Whether a tax imposed upon hotel patrons without regard to their use of the convention center supported by tax revenue, violates the Equal Protection Clause and/or the Due Process Clause of the Fourteenth Amendment.

2. Whether a hotel tax, tailored to reach non-residents and exempt state residents, which, in its practical operation, falls primarily upon non-residents, without regard to their use of the convention center supported by the tax revenue, violates the Interstate Commerce Clause.

3. Whether a tax upon private hotel accommodations used by interstate travelers constitutes an unjustified burden upon the right to travel and abide in the state of destination, in contravention of the Privileges and Immunities Clause, and/or the Equal Protection Clause, in the absence of a showing that the tax is substantially related to addressing some evil or local burden caused by such interstate travelers.

## **THE PARTIES**

The parties named in the caption are the same persons or entities participating as parties in the proceedings below.<sup>1</sup>

The named Petitioners represent the members of the classes determined by the trial court as follows:

Class A consists of:

All non-residents of Pennsylvania who have, or in the future will, stay over night in a hotel room subject to the Philadelphia Hotel Room Rental Tax, in the course of their interstate travel and/or participation in interstate commerce, between November 1, 1986 and the date the proposed new convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

Class B consists of:

All natural persons and entities, including Pennsylvania residents, who, in the course of their participation in interstate commerce, have, or in the future will, pay or reimburse the expenses of lodging a non-resident of Pennsylvania at a hotel subject to the Philadelphia Hotel Room Rental Tax between November 1, 1986 and the date the proposed convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

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<sup>1</sup>Petitioner Linda Morrison is identified below by her premarriage name, Linda Paustian. The Department of Revenue of the City of Philadelphia, which was named as a defendant below, is not a legal entity, but an operating department of Respondent City of Philadelphia, and is therefore omitted from the caption of this Petition.



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**IN THE UNITED STATES SUPREME COURT  
OCTOBER TERM, 1989**

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**LINDA MORRISON et al.**

**Petitioners**

**vs.**

**THE PENNSYLVANIA CONVENTION**

**CENTER AUTHORITY and**

**THE CITY OF PHILADELPHIA**

**Respondents**

**PETITION FOR A WRIT OF CERTIORARI TO  
THE PENNSYLVANIA COMMONWEALTH COURT**

Petitioners individually, and on behalf of the members of the classes they represent, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania, entered in the above entitled proceedings on August 4, 1989.

**OPINIONS BELOW**

The Opinion of the Commonwealth Court is reported as *Paustian v. Pennsylvania Convention Center Authority*, 561 A.2d 1337 (Pa. Commwlth. 1989) and is reprinted in the Appendix hereto at 1a.

The Opinion of the Court of Common Pleas of Philadelphia County is reported as *Paustian v. Pennsylvania Convention Center Authority*, 18 Phila. 45 (1988). It is reprinted in the Appendix hereto at 5a.

**JURISDICTION**

The Order of the Commonwealth Court of Pennsylvania was entered on August 4, 1989, affirming the Order of the Court of Common Pleas of Philadelphia County dated September 6, 1988, dismissing the Complaint with prejudice. By Order dated June 4, 1990, the Supreme Court of Pennsylvania denied Petitioners' Petition for Allowance of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### The Interstate Commerce Clause

U.S. CONST. art I, §8, cl. 3:

The Congress shall have the power . . .

To regulate Commerce with foreign Nations,  
and among the several States, and with the  
Indian Tribes.

### The Privileges and Immunities Clause

U.S. CONST. art. IV § 2, cl. 1:

The citizens of each State shall be entitled to  
all Privileges and Immunities of Citizens in the  
several States.

### The Fourteenth Amendment Due Process and Equal Protection Clauses

U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the  
United States, and subject to the jurisdiction  
thereof, are citizens of the United States and  
of the State wherein they reside. No state shall  
make or enforce any law which shall abridge  
the privileges or immunities of citizens of the  
United States; nor shall any state deprive any  
person of life, liberty, or property, without due  
process of law; nor deny to any person within  
its jurisdiction the equal protection of the laws.

The Pennsylvania Convention Center Authority Act  
Act of June 27, 1986, P.L. 267, No. 70, § 1 *et seq.*,  
PA. STAT. ANN. tit. 53 § 16201 *et seq.* (Purdon Supp. 1990)

Pertinent portions of the text are reprinted in the  
Appendix hereto at 21a.

### The Hotel Room Rental Tax Ordinance

PHILA. CODE § 19-2400 *et seq.*

The text is reproduced in the Appendix hereto at 28a.



## STATEMENT OF THE CASE

### I. HOW THE ISSUES WERE RAISED BELOW

On December 1, 1987, Petitioners filed their Complaint in the Court of Common Pleas of Philadelphia County, requesting a declaratory judgment invalidating the portion of the Philadelphia Hotel Room Rental Tax dedicated to the Pennsylvania Convention Center (hereinafter "Tax" or "Convention Center Tax"); the ordinance establishing the Tax (Hotel Room Rental Tax, PHILA. CODE § 19-2400 *et seq.*, as amended October 24, 1986, App. 28a-34a, hereinafter "Ordinance"), and the pertinent provisions of the state enabling legislation (Pennsylvania Convention Center Authority Act, Act of June 27, 1986, P.L. 267, No. 70, § 1 *et seq.*, PA. STAT. ANN. tit. 53 § 16201 *et seq.* (Purdon Supp. 1990), App. 21a-27a, hereinafter "Act") on grounds that they contravene the Due Process and Equal Protection Clauses of the Fourteenth Amendment; the Commerce Clause; and Privileges and Immunities Clause of the United States Constitution, facially,<sup>2</sup> and/or as applied to hotel patrons required to pay the Tax before the convention center is in operation (members of the Plaintiff Classes). The Complaint is reproduced at 35a-49a.

September 6, 1988, the Common Pleas Court dismissed the action on the Pleadings.<sup>3</sup> Petitioners filed a timely appeal

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<sup>2</sup>There is no basis for the Common Pleas Court's Finding that "Plaintiffs do not challenge the existing Tax after the Convention Center is constructed and in operation." Finding 19, 8a. The Complaint challenges the Tax on its face as well as in its application to members of the Plaintiff classes. ¶¶90-98, 48a-49a. At oral argument, the court asked: "Are you still arguing it's unconstitutional as to your class after the center becomes built and in operation?" Petitioners' counsel responded: "The answer to that depends upon the legal theory ... We have said that the tax is unconstitutional ... on its face or as applied to members of our class." Transcript of June 15, 1988 Argument at 33.

<sup>3</sup>On May 27, 1988 Respondents filed a Joint Motion for Summary Judgment, which relied upon market studies commissioned by proponents of the proposed convention center, and affidavits of supporters of the project. Petitioners objected to the consideration of this material as a matter of state law, because there was a credibility issue. Petitioners also presented, as

to the Pennsylvania Commonwealth Court.<sup>4</sup> On August 4, 1989, the Commonwealth Court affirmed the decisions of the Court of Common Pleas. The opinion of the Commonwealth Court is reproduced at App. 1a-4a. Petitioners' Request for Review by the Pennsylvania Supreme Court was denied on June 4, 1990.

All of the claims asserted in this Petition were presented in the Complaint, in the Commonwealth Court, and in the Request for Review by the Pennsylvania Supreme Court.

## II. MATERIAL FACTS

### A. The Convention Center Tax

The Philadelphia Hotel Room Rental Tax is imposed upon persons who rent sleeping accommodations in hotels located in the City of Philadelphia, for thirty days or less. PHILA CODE §19-2401, 2402 (1), App. 28a-31a. Hotel operators are required to collect the tax from their patrons, and remit the funds collected to the Department of Revenue of the City of Philadelphia. *Id.* § 2402, App. 30a.

Prior to the imposition of the Convention Center Tax, the Hotel Room Rental Tax was three percent (3%) of the consideration paid for room rental, and proceeds were restricted to funding the Philadelphia Convention and Visitors Bureau (hereinafter "PCVB"). Pursuant to authority granted in the Act, on October 24, 1986, Philadelphia City Council passed the Ordinance, which increased the Hotel Room Rental Tax to five percent (5%) of the room rate (six percent (6%)

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opposing documentation, an analysis of a recently released market study performed for PCCA, and the May, 1988 Report of the Legislative Oversight Committee of Philadelphia City Council.

At oral argument on June 15, 1988, in response to prompting by the court, Respondents amended their motion to include a request for Judgment on the Pleadings. On July 19, 1988, the Court of Common Pleas issued Findings of Fact and Conclusions of Law rejecting all of Petitioners' claims. 5a-20a.

<sup>4</sup>On September 29, 1988, the Court of Common Pleas entered an Order adopting its Findings of Fact and Conclusions of Law dated July 19, 1988 (5a-20a) as its Opinion for purposes of appeal.

after substantial completion of the Pennsylvania Convention Center) and allocated tax revenue between PCVB and the Pennsylvania Convention Center Authority (hereinafter "PCCA").<sup>5</sup>

The portion of the Hotel Room Rental Tax allocated to PCCA (the Convention Center Tax) is two percent (2%) of the consideration paid for hotel room occupancy, which is scheduled to increase to three percent (3%) after substantial completion of the Pennsylvania Convention Center, with further increments thereafter, until it reaches four and one half percent (4.5%). PHILA. CODE §19-2402 (2), App. 30a-31a.

From the initiation of the Tax in November, 1986, through September, 1987, Convention Center Tax proceeds totalled over two million, three hundred and seventy-three thousand dollars (\$2,373,000). Complaint ¶72, App. 46a.

The vast majority of hotel patrons subject to the Tax are non-residents of Pennsylvania, while the vast majority of hotel patrons who are exempt as "permanent residents" (hotel patrons who rent rooms for more than thirty (30) days) are state residents. Complaint ¶¶62-66, App. 44a-45a. Approximately eleven percent (11%) of Philadelphia hotel patrons attend conventions, trade shows or similar events. The vast majority of these events are too small to be held at the proposed convention center. Complaint ¶¶67-68, App. 45a.

#### **B. Background and Related Cases**

In *Allegheny County v. Monzo*, 509 Pa. 26, 500 A.2d 1096 (1985), the Pennsylvania Supreme Court invalidated an Allegheny County hotel tax dedicated to supporting a convention center in that county. The plaintiff in *Monzo* was a hotel owner who proved that his hotel, because of its location, would not benefit from convention center business. The court ruled that the Allegheny County tax violated the Fourteenth

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<sup>5</sup>This increase raised the total tax on Philadelphia hotel room rental from nine per cent (9%) to eleven percent (11%), including the six percent (6%) hotel tax imposed by the Commonwealth for general revenue purposes. Tax Reform Code of 1971, Article II, §209 *et seq.*, Act of March 4, 1971 P.L. 6, No.2, 72 PA. CONS. STAT. ANN. § 7209.

Amendment Due Process Clause because it was not a general revenue measure, and the burden was not proportionate to benefit.

To reduce the likelihood that the Philadelphia Tax would be invalidated under *Monzo*, the drafters of the Act included legislative findings that the proposed Pennsylvania Convention Center will benefit all Philadelphia hotels, as well as related businesses in the region, and the Commonwealth as a whole. PA STAT. ANN. tit. 53 § 16202, App. 21a-22a.

In *Leventhal v. City of Philadelphia*, 542 A.2d 1335 (Pa. 1988), a Philadelphia hotel owner challenged the Tax, raising the same arguments which prevailed in *Monzo*. The Pennsylvania Supreme Court applied the proportionate benefit test used in *Monzo*, but upheld the Tax, as applied to the hotel owners, on the basis of the trial court's finding that all hotels in Philadelphia would benefit from the development of the Pennsylvania Convention Center.

### C. The Expenditure of Tax Revenue

Revenue derived from the Convention Center Tax may only be used for costs associated with the planning, development, operation and marketing of the Pennsylvania Convention Center. PA STAT. ANN. tit. 53 § 16223 (g); PHILA. CODE § 19-2404 (2). Petitioners contend that such expenditures do not benefit travelers who visit the City for reasons other than attending events at the proposed convention center, especially those who rent Philadelphia hotel rooms before the facility is operational; or that the benefit is not proportionate to the burden imposed.

The Pennsylvania Convention Center is to be located in the central business district of Philadelphia. Complaint ¶39, App. 40a; Common Pleas Opinion, Finding 6, 18 Phila. at 47, App. 6a. If it succeeds as planned, non-convention travelers will be unable to find hotel accommodations in center city when a major convention is in town, and will be displaced to hotels remote from their ultimate destination. *Leventhal*, *supra* 542 A.2d at 1334, n. 6.

When the Complaint was filed, the convention center was projected to be completed in 1991, at a cost of four

hundred and seventy six million dollars (\$476,000,000). Complaint ¶81, App. 47a. While the action was pending in the trial court, the projected opening was delayed to 1992. Common Pleas Opinion, Finding 6, 18 Phila. at 47, App. 6a. In July, 1990, the projected opening date was postponed to 1993 or 1994. The cost has escalated to five hundred and twenty-three million dollars (\$523,000,000),<sup>6</sup> making it the most expensive convention center in the country, although it is not one of the largest.<sup>7</sup>

The Pennsylvania legislature appropriated one hundred and eighty-five million dollars (\$185,000,000) to be used for land assembly and demolition. Complaint ¶82, App. 47a.<sup>8</sup> The financing plan involves grants from the City of Philadelphia, a

<sup>6</sup>Paragraphs 36-49 and 73-86 of the Complaint (40a-42a, 46a-48a) relate the history of the project, including political conflicts which have contributed to the delay, and the exorbitant cost.

<sup>7</sup>The following table compares the cost of the proposed Convention Center with larger facilities built in the last decade.

CONVENTION CENTER	CITY	SIZE*	COST	YR.
Pennsylvania	Phila.	330	\$523M	
George R. Brown	Houston	470	\$104M	89
Jacob K. Javits	N.Y.	640	\$486M	87
McCormick Place	Chicago	425	\$312M	86
GA. World Congress	Atlanta	340	\$118M	86
New Orleans	N.O.	381	\$93M	84
Washington	D.C.	350	\$98.7M	83

\*Exhibit space in thousand sq. ft.

<sup>8</sup>This funding was authorized in reliance upon a commitment from the City administration not to request additional state assistance for the project. 1986 Leg. J. Senate 1707 (Mar. 10). The legislature also restricted the expenditure of most of the state funds until a firm commitment was secured from a private developer for the construction of the headquarters hotel. *Id.*



lease between PCCA and the City, and bonds issued by PCCA pursuant to the Act, PA. STAT. ANN. tit. 53 § 16207. Convention Center Tax revenue has been used for administrative expenses of PCCA and consulting services. Complaint ¶¶85-87, App. 47a-48a.

The Commonwealth, the City, and the bond holders expect a net return on their "investment".<sup>9</sup> Precompletion Convention Center Tax payers (members of the Plaintiff Classes) are the only financial backers of the venture who do not expect to profit.

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<sup>9</sup>The state contribution is financed by a bond issue requiring a three hundred and eighty-five million dollar (\$380,000,000) pay back of over twenty years. In making this commitment, the legislature relied upon projections that two billion, one hundred million dollars (\$2,100,000,000) in new state tax revenue would be generated by the Pennsylvania Convention Center over thirty years. 1986 Leg. J. Senate 1714, 1718 (Mar. 10)(Fumo); *Id.* 1716 (Pecora).

The 1983 study which was the basis for the City's support of the project predicted that a "world class" convention center would generate ten thousand (10,000) new jobs, and result in one billion dollars in net new tax revenue for the City. Report of the Legislative Oversight Committee of Council of the City of Philadelphia 7 (May, 1988), Plaintiffs' Exhibit B in Opposition to Defendants' Joint Motion for Summary Judgment. A 1988 update of that study performed for PCCA projects that the City will realize two hundred and thirty four million, six hundred and ninety thousand dollars (\$234,690,000) in new tax revenue, exclusive of dedicated hotel taxes, by the year 2001. PANNELL KERR FORSTER, PENNSYLVANIA CONVENTION CENTER AUTHORITY, MARKET DEMAND AND ECONOMIC IMPACT STUDY FOR THE PROPOSED PENNSYLVANIA CONVENTION CENTER, PHILADELPHIA, PENNSYLVANIA, II-8 (May, 1988), Plaintiffs' Exhibit A in Opposition to Defendants' Joint Motion for Summary Judgment.

## REASONS FOR GRANTING REVIEW

### I. REVIEW IS REQUIRED TO PROTECT THE FEDERAL INTEREST IN A NATIONAL ECONOMY AND SOCIETY WHICH TRANSCENDS STATE BOUNDARIES

In *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185 n. 2 (1938) this Court recognized that state legislation designed to promote local interests at the expense of non-residents is inherently suspect, because: "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subject to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." Such legislation "implicates not only the individual's right to non-discriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662-63 (1975).<sup>10</sup>

Special taxes imposed upon hotel patrons to support convention centers are common in metropolitan areas throughout the country. The impetus to impose these taxes is fueled by competition between convention cities, and pressure from the meeting and trade show industry. Non-convention travelers who are taxed to support these facilities will have no effective recourse, if this Court denies review in the present matter.

With few exceptions, major convention centers in the United States are publicly owned and operated. LAVENTHOL & HORWATH, CONVENTION CENTERS STADIUMS AND ARENAS, 2 (Urban Land Institute, 1989).<sup>11</sup> Because rents charged by publicly spon-

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<sup>10</sup>The right of United States citizens to travel, to relocate, and to work or do business in other states, is guaranteed under the Privileges and Immunities Clause, which was intended to "help fuse into one nation a collection of independent, sovereign states". *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Free trade between the states is also protected by the mutually reinforcing provisions of the Commerce Clause. *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978).

<sup>11</sup>Starting in the fifties, convention centers, stadiums and arenas were built by the hundreds to provide a use for land cleared by urban renewal, and to revitalize cities, which had lost their traditional role as regional retail centers. Publicly sponsored convention centers are not expected to operate profitably

sored convention centers are not adequate to cover their operation and financing, they invariably require some form of subsidy. *Id.* at 4-5, 43, 51, 57.

In recent years, the cost of convention centers development has skyrocketed, while federal subsidies have been cut back or eliminated. *Id.* at 49. Nevertheless, cities and resort communities throughout the country are expending billions of dollars to construct new convention centers, or expand and modernize existing facilities. Paustian, *How Cities Get LOOTED*, Wall St. J., Oct. 5, 1987 at 22.<sup>12</sup>

In the late seventies, many localities imposed taxes on hotel rooms and earmarked the proceeds for promoting tourism. As other resources for financing convention debt service and operating losses have diminished or proved inadequate, hotel taxes have become a major factor sustaining the boom in convention center construction. *Id.*; LAVENTHOL & HORWATH *supra* at 43-44, 49.

The effect of a hotel tax dedicated to support a convention center is to impose upon all travelers the cost of a program which

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because they are viewed as public works projects, and valued primarily for their effect in stimulating the local economy. Only three convention centers in the United States (the Hyatt in Chicago, Illinois; the Marriott World in Orlando, Florida, and Opryland in Nashville, Tennessee) are privately owned. Other private developers have been driven out of the market because rents established by the public sector are not sufficient to cover the costs of a privately financed facility. *Id.* 4; Goldstein, *The Convention Center that Razed Altamose*, Phila. Inquirer, Aug. 5, 1990, at 1-E, col. 1.

LAVENTHOL & HORWATH observes that public assembly facilities "baffle the public sector, which tends to know little about dealing with the issues they raise: most facilities lose money, they occasionally generate controversy or become political liabilities, and they do not fit neatly into the purpose of local governments." *Id.* at 2.

<sup>12</sup>Between 1975 and 1985, more than two hundred and fifty public assembly facilities were built or renovated, adding at least twelve million (12,000,000) square feet of exhibit and meeting space. *Id.* See note 7, at 7 *supra* for data regarding some of the larger facilities constructed during the last decade. Writing in October, 1987, Paustian states that sixty cities are now building or expanding convention centers for a total cost of more than six billion dollars (\$6,000,000,000). *Id.*



benefits a small<sup>13</sup>, but influential, segment of the traveling public -- convention related visitors. Non-convention hotel patrons are powerless to protect their interest because they are a diverse group without organizational clout or allies within the state.

The appeal of a dedicated hotel tax is virtually irresistible to state legislators, who are reluctant to commit scarce resources to expensive public works projects, or impose new taxes on their own constituents.<sup>14</sup>

The burden of hotel taxes fall almost exclusively upon non-residents; and the local business community is the major proponent of the tax. Paustian, *supra*. Convention center proponents reason that the tax can be imposed upon non-convention hotel patrons with minimal risk, because the general traveler's reason for visiting the area will almost always outweigh the burden of the tax. The interests of convention center users, on the other hand, are represented by a well organized industry with enormous leverage in the tourism market, because the patronage it produces is almost entirely discretionary. The National Association of Exhibition Managers has voted to boycott

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<sup>13</sup>Conference attendance accounts for 20% of hotel patronage in the United States. LAVENTHOL & HORWATH, U.S. LODGING INDUSTRY 16 (1988). However, only 32% of national conventions are large enough to be held at a major convention center. LAVENTHOL & HORWATH, CONVENTION CENTERS STADIUMS AND ARENAS, *supra* at 15.

<sup>14</sup>Funding convention centers differs from other governmental expenditures, because it is not viewed as a public service, but rather as a form of public "investment", justified by new tax revenue projected to be generated by the convention center. LAVENTHOL & HORWATH, CONVENTION CENTERS STADIUMS AND ARENAS, *supra* endorses the "investment" rationale, and advocates basing public support on an economic impact analysis which projects the amount of new taxes generated to each governmental entity. It states: "Often the taxes received by state and local governments will exceed the government expenditures required to subsidize the facilities' annual debt service and operating costs. Unfortunately, government units that benefit rarely support their benefactor, and never in proportion to their gains." *Id.* at 11.

The Commonwealth's support for the Pennsylvania Convention Center is a case in point. The state expects to realize over two billion dollars in new taxes revenue over thirty years in return for its investment of one hundred and eighty million dollars (\$180,000,000). See note 8, p. 7 *supra*.

cities that use hotel tax revenues for purposes other than convention center operations, financing, or promotion. *LAVENTHOL & HORWATH supra* at 44.

General travelers are also at a disadvantage in vindicating their rights through the legal system. Litigation contesting the validity of hotel taxes on federal constitutional grounds is deterred by the Tax Injunction Act, 28 U.S.C. §1341, which prevents taxpayers from initiating their action in federal district court; and remits them to state courts, which may be biased against non-residents.<sup>15</sup> As non-residents they also face practical impediments to pursuing an action in the state forum. Since the burden on the individual taxpayer is small in comparison to the cost of vindicating their rights, the constitutionality of hotel taxes is rarely litigated by hotel patrons.

If this Court permits the decisions of the Pennsylvania Commonwealth Court to stand, without review, it is unlikely that a case presenting these important constitutional questions will reach this level in the foreseeable future. In the meantime, the competitive pressures which motivate the adoption of dedicated hotel taxes will continue to operate, and even accelerate, unchecked by constitutional constraint. The unjustified exploitation of the traveling public is likely to become even more widespread and burdensome, further undermining the paramount national interest in freedom of travel, and free trade within the territorial boundaries of the United States.

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<sup>15</sup>Such bias may have influenced the outcome in the present case. In *Allegheny County v. Monzo, supra* and *Leventhal, supra*, where hotel taxes were challenged by local hotel owners, the plaintiffs were afforded an opportunity to establish that they would not benefit from the convention center supported by the tax, even though their burden was limited to tax collection. Here the Tax is challenged by non-residents, who are required to finance a convention center which does not even exist at the time they visited the City. Yet the state courts refused to credit the allegation that these Taxpayers are not benefitted by the proposed convention center, and dismissed the action on the pleadings.

## **II. THE DECISION OF THE COMMONWEALTH COURT IS INCONSISTENT WITH ESTABLISHED PRINCIPLES OF CONSTITUTIONAL LAW**

Although this Court has not previously considered the validity of taxes imposed upon transient hotel patrons to support local economic development projects,<sup>16</sup> Certiori should be granted because the decision of the Commonwealth Court is patently inconsistent with principles of constitutional law established in recent and time honored decisions of this Court.

### **A. The Tax Does Not Meet the Rational Relationship Standard for Equal Protection**

In applying the rational relationship test, courts identify the purpose of the legislation, and, to the extent that a legitimate state purpose is identified, determine whether the means are reasonably related to that purpose. *Zobel v. Williams*, 457 U.S. 55 (1982).

The purpose of the Convention Center Tax is to support the Pennsylvania Convention Center. Where tax revenue is dedicated to a specific use, this Court has required that the classification for imposition of the tax be reasonably related to benefit derived from the program or facility supported by the tax. See e.g. *Williams v. Vermont*, 472 U.S. 14 (1985). *Williams* invalidated a Vermont automobile use tax dedicated to highway maintenance, because the classification used in the tax was not reasonably related to the justification of requiring those who use the roads to pay for them.

The Convention Center Tax can not be justified on the rationale of requiring those who benefit from the Pennsylvania Convention Center to pay a fair share of the costs of financing and operating that facility, because the classification of persons

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<sup>16</sup>*508 Chestnut, Inc. v. City of St. Louis*, 389 S.W. 2d 823 (Mo. Ct. App.), appeal dismissed, 382 U.S. 203 (1965), upheld a hotel license tax imposed as part of a general licensing scheme. The state court rejected the argument that the ordinance was calculated to fall only upon non-residents of St. Louis, stating "The tax is not laid upon the hotel guest but on the hotel or motel. . ." 389 S.W. 2d 829.

subject to the Tax is both underinclusive and overinclusive. Persons who actually use the convention center are not subject to the Tax unless they also stay overnight in a Philadelphia hotel. Local residents, overnight guests of local residents, and conventioners who stay at hotels outside of Philadelphia, are not taxed. Yet, every person who pays for overnight accommodations at a Philadelphia hotel for thirty days or less from November 1986 is required to pay the Tax, without regard to use or benefit from the convention center, or whether the facility even exists at the time they visit the city.

Consequently the Tax constitutes an arbitrary exaction which discriminates against hotel patrons in contravention of the Equal Protection Clause, even under the relatively permissive rational relationship test.

In addition, the discrimination operates to the detriment of Philadelphia hotel patrons, a classification primarily composed of non-residents of the Commonwealth. Complaint ¶62, App. 44-45. The legislative purpose for the development of the Pennsylvania Convention Center is "the promotion, attraction, stimulation, development and expansion of business, industry, commerce and tourism in [Philadelphia] the surrounding counties and this Commonwealth as a whole." PA. STAT. ANN. tit. 53 § 16202; App. 21. Promoting local business and investment within the state is not an adequate justification for the imposition of a tax which discriminates against non-residents. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

**B. The Tax Contravenes the Privileges and Immunities Clause and/or the Equal Protection Clause Because It Burdens the Right to Travel**

The Privileges and Immunities Clause, U.S. CONST. art. IV §2, cl. 1 protects "the right of a citizen of one state to pass through or reside in any other state", and provides "an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (E.D.Pa., 1823).

In rejecting Petitioners' claim that the Tax imposes an impermissible burden on the right to travel, the Commonwealth

Court adopted the Opinion of the court below. 561 A.2d at 1338, App. 2a. The Common Pleas Court concluded that the Privileges and Immunities Clause is inapplicable because Pennsylvania residents as well as non-residents who rent hotel rooms in Philadelphia for thirty days or less are subject to the Tax. 18 Phila. at 63, App. 20a.

A law is not immune from review under the Privileges and Immunities Clause at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged. *United Bldg. & Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 218 (1984). A tax which singles out "transients" also falls within the scope of the Privileges and Immunities Clause because such a tax "has the necessary effect of including in the discrimination those who are citizens of other states". *Austin v. New Hampshire*, *supra*, 420 U.S. at 662, n.8.

Once it has been determined that a state law discriminates against non-residents, the state may justify its action only by demonstrating that there is a substantial reason for the difference in treatment; that is, that non-residents "constitute a peculiar source of the evil at which the statute is aimed." *United Building*, *supra* at 222. There is no suggestion that transient hotel guests are the source of a problem which the Act was intended to address. On the contrary, the legislative findings characterize non-resident hotel patronage as a positive economic opportunity for local residents, which the Act intends to promote.

In addition to conferring personal rights which are directly protected, the Privileges and Immunities Clause gives rise to a higher standard of scrutiny under the Equal Protection Clause. Classifications which impinge upon fundamental freedoms, including the right to travel and abide in the state of destination, may only be sustained by a compelling state interest, and the state may not choose a more restrictive alternative if its goal may be achieved with less burden on constitutionally protected activity. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

The Court of Common Pleas concluded that the Tax does not impose a burden on interstate travel because "one of



its stated purposes is to promote tourism which inherently means travel." 18 Phila. at 63, App. 20a.

In *Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) this Court held that a tax imposed upon airline passengers to help defray the cost of airport maintenance was not subject to the compelling state interest test, because the charge reflected a fair approximation of use of a facility provided at public expense to aid travel. A convention center, however, is not a facility which aids travel. It is merely a destination, which may motivate travel to one city, as opposed to another, as a result of the selection of a particular facility by convention or trade show organizers. More important, the Tax does not reflect a fair approximation of use of the Pennsylvania Convention Center, since it is based upon payment for hotel accommodations, without regard to whether the hotel patronage is related to attending an event at the Pennsylvania Convention Center. See discussion at p. 14, *supra*. The relevant precedent is *Crandall v. Nevada*, 73 U.S. 35 (1867), which invalidated a state tax imposed upon persons leaving the state by common carrier. *Evansville-Vanderburgh* distinguishes *Crandall* because the Nevada tax applied to passengers traveling by privately owned transportation, without regard to their use of any facility provided by the state. The Tax at issue here applies to travelers using privately owned hotel accommodations, without regard to their use of the public facility subsidized by the tax.

The exemption of hotel patrons who rent a room for more than thirty days also constitutes a durational residency requirement for tax exemption, which can not be sustained under the Equal Protection Clause. See *Shapiro v. Thompson, supra*; *Dunn v. Blumstein, supra*; *Attorney General v. Soto-Lopez, supra*.

### C. The Tax Discriminates Against Non-residents in Contravention of the Interstate Commerce Clause

A state tax which, in its practical application, discriminates against non-residents, contravenes the Interstate Commerce Clause. *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Business Reg. of Florida*, 58 LW 4665, 4672-73

(1990). A tailored tax, however accomplished, must receive careful scrutiny to determine whether it produces a forbidden effect on interstate commerce. *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 288 n. 15 (1977).

By imposing the Convention Center Tax upon transient hotel room rental, the Pennsylvania legislature tailored the Tax to impose the burden of subsidizing the Pennsylvania Convention Center upon travelers visiting Philadelphia, irrespective of their use of that facility, and exempt local residents.<sup>17</sup>

The fact that Pennsylvania residents are subject to the Tax when they rent a Philadelphia hotel room for thirty days or less does not overcome the discriminatory impact of the Tax. Where there is an inherent difference between state residents and non-residents, a measure which applies uniform treatment to both, to the detriment of non-residents, constitutes the kind of discrimination which the Interstate Commerce Clause is intended to prevent. *American Trucking, supra*; *Nippert v. Richmond*, 327 U.S. 416 (1946). Out-of-state residents are inherently more likely to rent hotel rooms on a short term basis when they are in Philadelphia, whether they come to attend an event at the Pennsylvania Convention Center, or visit for some unrelated purpose.

**D. The Tax Contravenes the Due Process and Interstate Commerce Clauses Because the Burden is Not Proportionate to Benefit**

Petitioners maintain that under the Due Process Clause, as well as the Interstate Commerce Clause, the Convention Center Tax can only be sustained if the burden on the Taxpayers is proportionate to their benefit from the Pennsylvania Convention Center, because Tax revenue is limited to supporting that facility. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-23 (1981); *Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc. supra*. Since hotel room rental (the incidence of the Tax) is not

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<sup>17</sup>The vast majority of "transient" hotel patrons are non-residents of Pennsylvania, while the vast majority of hotel patrons exempt as "permanent residents" are residents of Pennsylvania. Complaint ¶¶62-66.

a fair approximation of use or benefit from the Convention Center, the Tax is invalid on its face. At the very least, the requirement that benefit be proportionate to tax burden raises a factual issue, which precludes Judgment on the Pleadings.

In rejecting this argument the Commonwealth Court (561 A.2d 1338-39, App. 2a-3a) approved the analysis of the Court of Common Pleas, (18 Phila. at 55, 57, 61, App. 12a, 15a, 18a-19a) which relied upon *Airway Arms Inc. v. Moon Area School District*, 498 Pa. 286, 446 A.2d 234 (1982), *appeal dismissed sub nom. Grant-Oliver Corp. v. Moon Area School District*, 459 U.S. 1094 (1983) as well as *Commonwealth Edison*, *supra* in holding that direct benefit to Taxpayers is not required.

In *Commonwealth Edison* this Court held that proportionate benefit was not required to sustain the Montana coal severance tax, because the tax was "imposed for the general support of government." *Id.* at 621. On this basis, the Montana tax was distinguished from taxes or user fees assessed to reimburse the state for costs incurred in providing specific services, which require "a showing, based on factual evidence in the record, that the fees charged do not appear to be manifestly disproportionate to the services rendered." *Id.* at 622 n. 12.

*Airway Arms* upheld a local school district tax on parking, in its application to a parking lot which served a regional airport. In holding that proportionate benefit was required to sustain the Allegheny County convention center tax, the Pennsylvania Supreme Court in *Monzo*, *supra* distinguished *Airway Arms* because it involved "taxation for general public use which includes taxes for schools" 509 PA. at 43, 500 A.2d at 1105. In *Leventhal*, *supra* that court again applied the proportionate benefit test in sustaining the Tax at issue here, as applied to hotel owners.

In affirming the lower court decision, the Commonwealth Court states: "the court properly characterized the additional tax burden on the individual appellants as minimal when compared to the prospective good to be achieved by both residents and visitors alike." 561 A.2d 1338, App. 3a. This analysis focuses on the individual Taxpayer in assessing the burden, while it encompasses the entire universe of present and future "visitors" to Philadelphia in assessing benefit. It assumes that the development of the proposed convention center will ultimately



inure to the benefit of some visitors, and attributes that benefit to visitors in general. This fallacy obscures, but does not address, the fundamental problem that all transient hotel patrons, commencing in November, 1986, are required to pay the Tax, without regard to whether they receive any benefit from the Pennsylvania Convention Center.

The imposition of the Tax irrespective of benefit is particularly clear with respect to hotel patrons who visit Philadelphia before the Pennsylvania Convention Center is open. The Commonwealth Court rejected the argument that the Tax violates due process in its application to precompletion hotel patronage, stating:

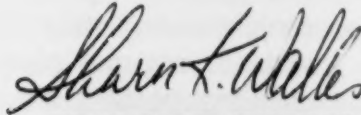
Though appellants may not receive tangible benefit at present, we reject the implication that the Convention Center project cannot be funded through the imposition of a tax before the project's completion and operation. We agree with the common pleas court that allowing a challenge pending, but not after, completion of the Convention Center would lead to the unacceptable result that no civic project could be similarly funded until that project is "on line". (*Id.* at 1339, App. 3a-4a.)

Since the imposition of the Tax prior to the completion of the Pennsylvania Convention Center cannot be justified on the basis of contemporaneous benefit, it can only be justified on the basis of future benefit to these Taxpayers. There is no basis to predict that hotel patrons who visit Philadelphia while the project is in the planning or construction phase will ever return to the city after it is in operation, much less that they will return to attend an event at the Pennsylvania Convention Center. If they do return, as conventioners or otherwise, and stay in Philadelphia hotels, they will again be subjected to the Tax, without receiving any greater benefit than the hotel patrons who visits the city for the first time after the opening of the Pennsylvania Convention Center. Consequently, the burden on these Taxpayers is not proportionate to benefit, and the Tax constitutes a taking of property without due process of law.

## CONCLUSION

For the reasons set forth above, the Philadelphia Convention Center Tax discriminates against non-residents of the Commonwealth and violates their right to travel and temporarily abide in Philadelphia hotels, in contravention of the Equal Protection, Due Process, Privileges and Immunities and Commerce Clauses of the United States Constitution. This Petition for Certiori should be granted because the decision of the Commonwealth Court upholding the Tax is inconsistent with established principles of constitutional law, and review is necessary to vindicate the paramount federal interest in protecting a national economy and society which transcends state boundaries.

Respectfully submitted,



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August 28, 1990

## APPENDIX



PAUSTIAN, *et al.*, v. PENNSYLVANIA  
CONVENTION CENTER AUTHORITY *et al.*

COMMONWEALTH COURT OF PENNSYLVANIA  
No. 2328 CD 1988

Before CRUMLISH, PJ., and CRAIG, DOYLE,  
COLINS, PALLADINO, MCGINLEY, and SMITH  
Argued March 8, 1989  
Filed August 4, 1989

JAMES CRUMLISH, JR., President Judge

Linda Paustian *et al.* (appellants) appeal a Philadelphia County Common Pleas Court order<sup>1</sup> granting a motion for judgment on the pleadings filed by the Pennsylvania Convention Center Authority, the City of Philadelphia and the Department of Revenue (appellees). We affirm.

Appellants brought their complaint as a class action seeking a declaratory judgment that the Hotel Room Rental Tax<sup>2</sup> and its enabling legislation, the Convention Center Authority Act,<sup>3</sup> are unconstitutional.

Appellants represent two classes: Class A consists of nonresidents of Pennsylvania required to pay the tax prior to the time the Convention Center is open, and Class B is composed of persons who pay the tax by reimbursing travel expenses of Pennsylvania nonresidents during the same period. Appellants aver that pending the start-up of Convention Center operation, they will be taxed to support the planning and construction of the Center without realizing any benefit. Appellants' Complaint, para 8. They assert violations of their due process and equal protection rights under the U.S. Constitution, U.S. CONST. amend XIV §1, a violation of their right to

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<sup>1</sup>Appellees' motion was heard by Prattis, Gafni and Sheppard, Jr. JJ., sitting as a three-judge panel of the Court.

<sup>2</sup>Philadelphia Code, §§19-2400-2403, enacted by ordinance of City Council (Bill No. 1013) approved October 24, 1986.

<sup>3</sup>Act of June 27, 1986, P.L. 267, *as amended*, 53 P.S. §16201--16246.

interstate travel, U.S. CONST. art. IV, §2, cl.2, and a violation of the commerce clause, U.S. CONST. art I, §8, cl.3.

In ruling on appellees' motion for judgment on the pleadings, the common pleas panel held that (1) the issues the appellants presented constituted purely legal questions appropriate for disposition in the context of a judgment on the pleadings; (2) the tax and Act did not violate the due process and equal protection clauses of the U.S. Constitution because the burden imposed on appellants is not palpably disproportionate to the benefits received;<sup>4</sup> (3) that tax and Act did not violate the federal Commerce Clause since Pennsylvania residents and nonresidents alike stand to benefit from the concomitant developments associated with the Convention Center; and (4) the right to interstate travel was not infringed because, again, the tax was not limited to nonresidents and was explicitly intended to promote tourism.

The opinion of the common pleas court panel ably disposes of the appellants' contention on appeal and we will affirm on the opinion of Judge Lawrence Prattis docketed at No. 5396 November Term, 1987, and reported as *Paustian v. Pennsylvania Convention Center Authority*, Pa. D.& C. 4th , 18 Phila. 45 (1988).

We write to address appellants' contention that the common pleas court erred in entering judgment on the pleadings because the court did not, as is required in ruling on such a motion, *Council 13, AFSCME v. Thornburgh*, 108 Pa. Commonwealth Ct. 155, 529 A.2d 1143 (1987), accept as true their averments that the tax burden would fall primarily upon out-of-state residents without an appreciable corresponding benefit. They maintain that the legal issues here are not so free from doubt as to render a trial a meaningless exercise. *North Star Coal Co. v. Waverly Oil Works Co.*, 447 Pa. 241, 288 A.2d 768 (1977).

It is not accurate to say that the common pleas court did not accept as true appellant's averments of 'burden without

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<sup>4</sup>In this section of its opinion, the common pleas court also rejected appellants' contention that the Act created a special law" and thus was subject to a strict proportionality requirement.

benefit.' Rather, under the principle articulated in *Airway Arms, Inc. v. Moon Area School District*, 498 Pa. 286, 446 A.2d 234 (1982), the court properly characterized the additional tax burden on the individual appellants as minimal when compared to the prospective good to be achieved by both residents and visitors alike. Thus, the common pleas court panel permissibly interpreted the appellants' allegations in light of the facts as it knew them to be without rejecting them absolutely, as appellants would have this Court find. We also agree with the common pleas court panel that the constitutional issues presented are primarily legal in nature and are properly disposed of in this procedural posture. While there is no directly apposite authority, our Supreme Court's dispositions in *Leventhal v. City of Philadelphia*, 518 Pa. 233, 542 A.2d 1096 (1988), and *Allegheny County v. Monzo*, 509 Pa. 26, 500 A.2d 1096 (1985), provide sufficient guidance for the common pleas court and this Court to determine the constitutionality of the instant tax as applied to these appellants.

Appellants' principal constitutional argument that the Act violates the Special Law Clause of the Pennsylvania Constitution, Article 3, Section 32,<sup>5</sup> is also without merit. A special tax is one levied for a special local purpose for the benefit of a part of a political body and which rests upon the supposition that a portion of the public is specially benefitted. 84 C.J.S., Taxation, §3; *Allegheny County v. Monzo*. Here, despite the benefits peculiar to the City of Philadelphia, the General Assembly explicitly justified the expenditure of state funds for the Convention Center to promote the health, safety, employment, business opportunities and general welfare not only of the City, but of the surrounding counties and the Commonwealth as a whole. Section 16202 of the Act, 53 P.S. §6202. Though appellants may not receive tangible benefit at present, we reject the implication that the Convention Center project cannot be funded through the imposition of a tax before the project's completion and operation. We agree with

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<sup>5</sup>PA. CONST. art. 3, §32 provides: "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . ."

the common pleas court that allowing a challenge pending, but not after, completion of the Convention Center would lead to the unacceptable result that no civic project could be similarly funded until that project is "on line." "The Act represents an appropriate exercise of the Legislature's power to enact taxes directly towards a legitimate public goal." *Leventhal* at 245, 542 A.2d at 1334.

Judge Doyle dissents.



**PAUSTIAN, *et al.*, v. PENNSYLVANIA  
CONVENTION CENTER AUTHORITY *et al.***

**COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
NOVEMBER TERM, NO. 5396**

**PRATTIS, J; GAFNI, J; SHEPPARD, JR., J.**

**July 19, 1988**

**ACTION FOR DECLARATORY JUDGMENT**

**FINDINGS OF FACT**

1. On June 27, 1986, the General Assembly of Pennsylvania enacted the Convention Center Authority Act, 53 P.S. Sections 16201, *et seq.* ("Act"). The Act created the Pennsylvania Convention Center Authority to oversee the construction of a Convention Center and to operate it upon its completion.

2. The Act authorized the council of cities of the first class "to impose an excise tax on the consideration received by each operator of a hotel within the city from each transaction of renting a room or rooms to accommodate transients." 52 P.S. Section 16223(b). The tax is to be collected by the hotel operator from the patron of the room and paid over to the city.

3. Presently, Philadelphia is the only city of the first class in Pennsylvania.

4. Pursuant to the Act, Philadelphia's City Council enacted a Hotel Room Rental Tax ("Tax") on October 22, 1986. Philadelphia Code Sections 19-2401, *et seq.* Prior to the passage of the Tax, Philadelphia was imposing a three (3%) percent tax on hotel room rentals to support the Philadelphia Convention and Visitors Bureau. The Tax increased the pertinent hotel room rental tax to five (5) and later six (6%) percent and dedicated the increase to Convention Center purposes.

5. The Tax applies only to hotels located in Philadelphia.

6. The new Convention Center will be located in center city Philadelphia with a projected opening date in 1992.

7. Plaintiffs represent two classes of persons who pay the Tax, as described with particularity in Finding of Fact No. 8, *infra*, and in paragraphs 5 through 21 of plaintiffs' complaint.

8. On June 8, 1988, pursuant to a Stipulation of counsel for the parties, this Court ordered that the present action shall proceed as a class action pursuant to Rules 1701, et seq., of the Pennsylvania rules of Civil Procedure, on behalf of the following classes:

(A) Plaintiffs John Fund, Richard Brogolino and Stuart Kessler shall be certified as representatives of the members of Class A, which shall consist of:

All non-residents of Pennsylvania who have, or in the future will, stay over night in a hotel room subject to the Philadelphia Hotel Room Rental Tax, in the course of their interstate travel and/or participation in interstate commerce, between November 1, 1986 and the date the proposed new convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

(B) Plaintiffs Linda Paustian and John Famularo shall be certified as representatives of Class B, which shall consist of:

All natural persons and entities, including Pennsylvania residents, who, in the course of their participation in interstate commerce, have, or in the future will, pay or reimburse the expenses of lodging a nonresident of Pennsylvania at a hotel subject to the Philadelphia Hotel Room Rental Tax between November 1, 1986 and the date the proposed convention center becomes operational, or the date the portion of the said tax dedicated to the Au-

thority for convention center purposes is eliminated, whichever is sooner.

9. The named defendants and their legal status are set forth in paragraphs 2 through 4 of plaintiffs' Complaint.

10. The background pertinent to, and the development of the Convention Center Proposal and the creation of the Pennsylvania Convention Center Authority ("Authority") is described in detail in paragraphs 36 through 52 of plaintiffs' Complaint.

11. Philadelphia is a uniquely well suited location for the construction of a major convention center. Development of a major convention center is more appropriate in a city of the first class which, because of its size, is capable of attracting major national conventions. 53 P.S. Section 16202(3).

12. The attraction of business to this Commonwealth as a result of the development of a major convention center is an important factor in the continual encouragement, promotion, attraction, stimulation, development, growth and expansion of business, industry, commerce and tourism within Philadelphia, the surrounding counties and this Commonwealth as a whole. 53 P.S. Section 16202(3).

13. The development of the convention center will provide benefits: (1) to the hotel industry throughout the entire area of such city where such a center is developed, (2) to the restaurant and entertainment industries throughout the entire area of such city where such a center is located, (3) to all other businesses and individuals benefitted by the attraction of major conventions and tourists, (4) to other individual businesses whose livelihood is dependent thereon, and, (5) to the general public. 53 P.S. Section 16202(5) and (6).

14. The need for a convention center and the promotion of it, which will provide significant benefits to the general public, will require the expenditure of public money and it is appropriate to authorize such city to impose and collect a tax applicable within the entire territorial limits of such city, to facilitate the development of a convention facility and the promotion of tourism within such city. 52 P.S. Section 16202(7).

15. The health, safety and general welfare of the people of this Commonwealth are directly dependent upon the continual encouragement, development, growth and expansion of business, industry, commerce and tourism within this Commonwealth. 53 P.S. Section 16202(1).

16. The Tax is two percent (2%) of the amount paid for renting a hotel room in Philadelphia. Prior to the passage of the Tax, Philadelphia imposed a three percent (3%) tax on hotel room rentals to support the Philadelphia Convention and Visitors Bureau. The Tax increased the pertinent hotel room rental Tax to five percent (5%) and authorizes a subsequent increase to six percent (6%), when the Convention Center is substantially completed. 53 P.S. 16223(c)(3).

17. The Tax is paid by anyone who rents a Philadelphia hotel room for less than thirty (30) consecutive days; conversely, anyone who rents a Philadelphia hotel room for thirty (30) or more consecutive days does not have to pay the tax. Philadelphia Code Sections 19-2401(5),(9).

18. Plaintiffs do not challenge that portion of the Hotel Room Rental Tax (presently, three percent (3%) tax on hotel room rentals) which supports the Philadelphia Convention and Visitors Bureau.

19. Plaintiffs do not challenge the existing Tax after the Convention Center is constructed and in operation.

20. At the June 15, 1988, oral argument, plaintiffs conceded that if the Tax were collected for the general fund of the City, they would have no basis to challenge the Tax.

21. At the June 15, 1988, oral argument, defendants moved to amend their motion to include a Motion for Judgment on the Pleadings pursuant to Pa. R.C.P. 1034(a).

#### DISCUSSION

Plaintiffs request the Court to enter a declaratory judgment that that portion of the Tax which supports the proposed Convention Center (and its enabling legislation, the Act) are unconstitutional as applied to the members of Class A and Class B, pending completion and operation of the proposed Convention Center. Plaintiffs seek declaratory relief because:

Pending commencement of operation of the Reading Convention Center, nonresidents of Pennsylvania who rent overnight accommodations in Philadelphia hotels will be taxed to support the planning and construction of the convention center without realizing any benefit from the existence of said convention center.

Complaint paragraph 89.

Plaintiffs urge that the tax and the Act violated the Due Process, the Equal Protection, and the Interstate Commerce Clauses of the United States Constitution, and impose an improper burden on citizens' right to travel.<sup>1</sup>

It is significant to note that plaintiffs do not challenge the existing three percent (3%) Hotel Room Rental Tax which supports the Convention and Visitors Bureau. Moreover, plaintiffs do not challenge the existing Tax after the convention Center is constructed and operating. Further, at argument, plaintiffs' counsel conceded that all of plaintiffs' objections to the efficacy of the Convention Center and the Tax would be moot if the Tax went into the general funds of the City. We are left, then, with a very small class objecting to payment of a portion of a tax for a limited period of time.

This Court holds that the Tax and its enabling Act are constitutional under the United States and Pennsylvania Constitutions, relying on *Leventhal v. City of Philadelphia*, 517 Pa. 324, 536 A.2d 339 (1988), opinion filed May 24, 1988. Moreover, the Tax does not violate the Commerce Clause of the United States Constitution because it is applied equally to individuals traveling in interstate commerce and to those who are not. Finally, the Tax does not improperly interfere with the right to travel, because it is imposed equally upon resident and nonresident hotel guests and its purpose is to promote, rather than to impede travel.

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<sup>1</sup>See paragraphs 90 through 98 of plaintiffs' Complaint.

I. *Judgment on the Pleadings May Properly  
Be Entered*

This matter is properly before the Court on defendants' Motion for Judgment on the Pleadings.<sup>2</sup> A Motion for judgment on the pleadings is seasonable "after the pleadings are closed, but within such time as not to delay trial." Pa. R.C.P. 1034(a). Although Pa. R.C.P. 1034 does not state specifically what is to be raised, a failure to state a claim upon which relief can be granted is appropriate. *Goodrich-Amram* 2d, section 1034(a). A motion for judgment on the pleadings is to be granted when the court is presented with a clear case in which all issues of fact are resolved. *Coal Operators Casualty Co. v. Charles T. Easterby & Co.*, 440 Pa. 218, 269 A.2d 671 (1970). The court's consideration of a motion for a judgment on the pleadings is inherently limited to the well-pleaded facts, admissions, and documents properly attached to the pleadings. *Balush v. Borough of Norristown*, 292 Pa. Super. 416, 437 A.2d 453 (1981).

Here, plaintiffs' Complaint describes in detail:

- (a) the legal status of the parties (paragraphs 2 through 21),
- (b) the descriptions of the classes (paragraphs 22 through 35),<sup>3</sup>
- (c) the development of the Convention Center Proposal and the creation of the Authority (paragraphs 36 through 52),
- (d) the enactment and application of the Tax (paragraphs 53 through 72), and,
- (e) the operation of the Authority (paragraphs 73 through 88).

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<sup>2</sup>At oral argument on June 15, 1988, counsel for defendants amended their Motion for Summary Judgment to make certain that defendants sought, in the alternative, Judgment on the Pleadings.

<sup>3</sup>This Court, on June 8, 1988, certified the described classes pursuant to the Stipulation of the parties.



The defendants do not, in essence, contradict any of the pertinent, well-pleaded facts, nor apparently could they. Defendants do, however, deny those paragraphs which do not, in legal intendment, embody factual averments but rather legal arguments or conclusions relative to the ultimate issues in the case.

Upon consideration of plaintiffs' Complaint and defendants' Answer, this court is satisfied that the issues presented constitute legal questions which may be presently answered in the context of judgment on the pleadings.

II. *The Tax and the Act Do Not Violate the Due Process and the Equal Protection Clauses of the United States Constitution*

These very constitutional issues were the focus of, and were answered by the Pennsylvania Supreme Court's Opinion in *Leventhal v. City of Philadelphia*, 517 Pa. 324, 536 A.2d 339 (1988), opinion filed May 24, 1988. In *Leventhal*, the Supreme court held:

The principles which govern analysis of the claims asserted here are well established. First, and foremost, is a presumption that tax enactments are constitutionally valid and the burden is upon the person challenging the tax (citations omitted). *Monzo*, at 36, 500 A.2d 1101. The Legislature, in the exercise of its taxing power, is subject to the requirements of the Equal Protection and Uniformity Clauses. *Alco Parking Corp. v. City of Pittsburgh*, 453 Pa. 245, 307 A.2d 851, *rev'd on other grounds*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974). However, the Legislature possesses wide discretion in matters of taxation. *Aldine Apartments v. Commonwealth*, 493 Pa. 480, 426 A.2d 1118 (1981).

So far as the reasonableness of classifications made for the purposes of taxation is concerned, the Uniformity Clause of the Constitution of Pennsylvania and the Equal Protection Clause of the Constitution of the United



States stand in *pari materia*. *Commonwealth v. Life Assurance Co. of Pa.*, 419 Pa. 370, 214 A.2d 209 (1965). Both the Federal Equal Protection Clause, as applied to taxing statutes and the state constitutional requirement of uniformity of taxation "upon the same class of subjects" (PA. CONST. art. VIII, § 1) mandate that classification in a taxing scheme have a rational basis. In either case, a classification for tax purposes is valid when it "is based upon some legitimate distinction between the classes that provides a non-arbitrary and 'reasonable and just' basis for the different treatment." *Leonard v. Thornburg*, 507 Pa. 317, 321, 489 A.2d 1349, 1350 (1985), quoting *Aldine Apartments v. Commonwealth*, *supra*. Where there exists no legitimate distinction between the classes, and thus, the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated, the tax is unconstitutional. *Com. v. Staley*, 476 Pa. 171, 180, 381 A.2d 1280, 1284 (1978). The controlling standard for determining whether a tax is violative of the Due Process Clause of the Fourteenth Amendment is "...whether the taxing power exerted by the state bears a fiscal relation to protection, opportunities and benefits given by the state. The simple question is whether the state has given anything for which it can ask in return."

*Leventhal, supra*, J-18-1988, at pp. 6-7.

The test implicated by these principles is met in this case. "The only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Airway Arms, Inc. v. Moon Area School District*, 498 Pa. 286, 304, 446 A.2d 234, 244 (1982).

Furthermore, plaintiffs' attempt, at the June 15, 1988 hearing, to avail themselves of the argument that the Tax is violative of the Special Laws provision of the Pennsylvania Constitution<sup>4</sup> must similarly fail. *Leventhal* holds:

Finally, also in contrast to *Monzo*, the Act here does not violate the Special Law Clause of the Pennsylvania Constitution, Art. 3, Section 32. The drafters of the Act were aware of *Monzo* when they drafted this legislation. See Legislative Journal-Senate 1706, 1712 (daily ed. March 10, 1986); Legislative Journal-House 398 (daily ed. March 11, 1986). The General Assembly spent numerous hours debating the merits of building a convention center in Philadelphia, and whether the project would generate sufficient jobs and revenues to justify the expenditure of state funds. The Legislature made specific findings that: (a) the general welfare of this Commonwealth is dependent upon the continual encouragement, development, growth and expansion of business, commerce and tourism within the Commonwealth; (b) the development of a major convention center is most appropriate [sic] in a city of the first class; (c) the purpose of such a center should be the promotion of business and tourism in such a city; and (d) the development of such a convention center will provide benefits to the hotel industry throughout the entire area of such a city where such a center is developed. 53 Pa. C. S. Section 16202.

These legislative findings are given great weight by this Court, and the findings are supported by the evidence presented at trial, that all hotels in Philadelphia will benefit from the convention center. In contrast to *Monzo*,

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<sup>4</sup>Pennsylvania Constitution, Article III, Section 32.

the Philadelphia Convention Center is not a special purpose project from which only a small group will benefit, rather it will benefit all of Philadelphia. Further, in *Monzo*, all hotels in Allegheny County were taxed to support a Convention Center for the City of Pittsburgh, which is only one of 127 municipalities in the county of Allegheny, while here only hotels in Philadelphia are taxed to support the Philadelphia Convention Center.

*Leventhal, supra*, J-18-1988 at pp. 16-17.

As noted, plaintiffs do not challenge that portion of the existing Hotel Room Rental Tax which is devoted to supporting the convention and Visitors Bureau. In this regard, the Court accepts defendants' suggestion that, while plaintiffs characterize this litigation as an attack solely upon the use of the Tax for the Convention Center, in fact, there is no logical distinction between the application of their argument to the use of tax proceeds for the Convention and Visitors Bureau or for the Convention Center itself once completed.<sup>5</sup> It is instructive that in other jurisdictions hotel taxes have been upheld against challenges similar to that presented here. See *Metropolitan Dade County v. Golden Nugget Group*, 448 So.2d 515 (Fla. Dist. Ct. App. 1984) *approved*, 464 So.2d 535 (Fla. 1985); *Second St. Properties, Inc. v. Fiscal Court*, 445 S.W.2d 709 (KY. Ct. Ap. 1969); *508 Chestnut Inc. v. City of St. Louis*, 389 S.W.2d 823 (Mo. Ct. App.), *appeal dismissed*, 382 U.S. 203 (1965); *Bailey v. Muskegon County Bd. of Comm'rs*, 122 Mich. App. 808, 333 N.W.2d 144 (1983).

It is submitted that there is no need to make further inquiry into the value of the benefit conferred upon plaintiffs

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<sup>5</sup> Parenthetically, it is noted that to accept plaintiffs' argument that the Tax may be challenged pending, but not after, completion and operation of Convention Center would lead to the anomalous result that no civic project could be similarly funded until that project is complete and on line.

in relationship to the burden<sup>6</sup> imposed upon them. Certainly, this burden is not palpably disproportionate to the benefits received by the plaintiffs, as stated by the Legislature in 16 P.S. Section 16202, and under the principles and rationale set forth in *Leventhal supra*,<sup>7</sup> and *Airway Arms, supra*.

### III. The Tax and the Act Do Not Violate the Commerce Clause of the United States Constitution

The Commerce Clause (Article I, Section 8) of the United States Constitution provides:

The Congress shall have the power ...  
to regulate Commerce with foreign nations,  
and among the several states ...

Two basic contentions are urged by plaintiffs: (1) that the Tax is discriminatory to nonresidents; and, (2) that the Tax imposes a burden on commerce which is not justified by a proportionate, related benefit.<sup>8</sup>

Historically, decisions involving state taxation affecting interstate commerce have reflected tensions between competing considerations-the protection of commerce from excessively burdensome state taxes and a state's need to require interstate business to pay its fair share of the cost of state and local government. In 1977, a unanimous United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), signalled the end of the

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<sup>6</sup>At oral argument it was stated that this burden imposed on a person staying one night in an average hotel room is \$1.56 or two percent (2%) of the hotel room bill.

<sup>7</sup>The Supreme Court in *Leventhal, supra*, held that the Act and the Tax do not violate the Uniformity Clause of the Pennsylvania Constitution or the Equal Protection and due Process Clauses of the United States Constitution. The Court said, "the Act represents an appropriate exercise of the Legislature's power to enact taxes toward a legitimate public good." *Leventhal, supra*, J-18-1988 at p. 16.

<sup>8</sup>Plaintiffs' Complaint, paragraphs 95 through 98.

formal rule that states may not tax an activity of interstate or foreign commerce.

In 1978, citing *Complete Auto Transit, Inc., supra*, the United States Supreme Court in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), stated the following legal test:

The Court repeated has sustained taxes that are applied to activity with substantial nexus with the state, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the state.

435 U.S. at p. 750. Thus, analysis of the Commerce Clause challenge requires application of this four part test to the factual context presented.

The first criterion requires a showing that the tax is applied to an activity embodying a substantial nexus with the state. The second parameter requires that the tax be fairly apportioned. Here, plaintiffs concede that the first two requirements of the test have been met.<sup>9</sup> However, they argue that the remaining two criteria are not satisfied. We disagree.

The third prong of the test dictates that the tax not discriminate against interstate commerce in favor of intrastate commerce. The purpose of the Commerce Clause was to create and foster a common market among the states; as such, it does not eclipse the power of sovereign states to tax, but it does limit that power. The principle consistently applied is that no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to

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<sup>9</sup>"Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion for Summary Judgment" ("memorandum") at page 24, states:

The first requirement is that there be a nexus with the state imposing the tax. The second is that it be "fairly apportioned" to activity conducted within the state. These requirements are met, since hotels required to collect the tax are located within the Commonwealth, and the tax is directly related to the use of those hotels.

local business. Equal treatment of interstate commerce is the fundamental test of state taxes on commerce. The United States Supreme Court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977), stated the principle, as follows:

A state may no more use discriminatory taxes to assure nonresidents direct their commerce to business within the state than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the clause is to assure that there be free trade among several states. This free trade purpose is not confined to the freedom to trade with only one state; it is a freedom to trade with any state, to engage in commerce across all state boundaries.

429 U.S. at pp. 334-35. The constitutional protection does not require that all person be treated equally at all times. Rather, the essence of the constitutional guarantee is simply that whatever statutory classifications are made must be reasonable.

Here, the statutory class includes anyone who rents a hotel room for less than thirty (30) consecutive days, whether actually a Philadelphia resident or nonresident. Conversely, anyone who rents a Philadelphia hotel room for thirty (30) or more days, irrespective of his/her domicile, does not have to pay the Tax. Hence, the classification is rational and those within the class are treated equally.

The governmental purpose advanced by the classification under the rationale of *Leventhal*, *supra*, is likewise proper.<sup>10</sup> Moreover, the citizens who stand to benefit from a Convention Center, with all its surrounding and concomitant developments, include persons, whether Philadelphians or not, who rent hotel rooms for less than thirty (30) days.

The final part of the *Complete Auto Transit, Inc. v. Brady*, *supra*, analysis requires a showing that the taxes are fairly related to services provided by the state. This aspect of

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<sup>10</sup>See discussion at pp. 12-14, *supra*. See also 53 P.S. Section 16202.



the analysis was discussed by the United States Supreme Court in *General Motors Corporation v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 930 (1964), as follows:

A careful analysis of cases in the field teaches that the validity of the tax rests upon whether the state is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellants' activities within the State and to appellants' consequent enjoyment of the opportunities and protections which the State has afforded. ... [T]he simple controlling question is whether the state has given anything for which it can ask in return.

377 U.S. at pp. 440-41 (citations omitted).

Presently, and prior to the opening of the Convention Center, the City of Philadelphia provides numerous services, including transportation, and police and fire protection to all those persons in the jurisdiction, including tourists, at any given time. These benefits as well as those previously discussed in the Opinion demonstrate that the fourth requirement of the test has been satisfied.

Plaintiffs' challenge to these latter two requirements apparently is their belief that the Tax "does not reflect a fair approximation of the use of the facilities (the convention center) for whose benefit it is imposed".<sup>11</sup> To the extent their contention is grounded upon the argument that the Tax is a special tax it must fail under the rationale of *Leventhal, supra*.<sup>12</sup> To the extent this contention is based on the argument that it must be shown that each taxpayer received a quantifi-

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<sup>11</sup>Plaintiffs' Memorandum at p. 25.

<sup>12</sup>See discussion at pp. 13-14, *supra*.



able benefit for the specific tax he/she pays it must fail under the principles of *Airway Arms Inc.*, *supra*.<sup>13</sup> See also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 n. 16 (1981).

In summary, the Tax does not violate the Commerce Clause in that it applies equally to persons involved in interstate commerce and those who are not.<sup>14</sup>

#### IV. *The Tax Does Not Violate the Privileges and Immunities Clause of the United States Constitution*

The Privileges and Immunities Clause, Article IV, Section 2, Clause 1, of the United States Constitution provides:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

The right to travel from one state to another, and to abide in the state of destination, is a privilege and immunity of United States citizens. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S.Ct. 2317 (1986); *Shapiro v. Thompson*, 394 U.S. 618, 630-631, 89 S.Ct. 1322, 1329-30 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). In *Attorney General v. Soto-Lopez*, *supra*, the United States Supreme Court defined the constitutional right to travel as follows: "A state law implicates the right to travel when it actually deters such travel, when it impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." (citations omitted)

Plaintiffs contend that the Tax "imposes a burden upon interstate travel, a privilege and immunity of United States Citizens."<sup>15</sup> Plaintiffs' argument fails under *Soto-Lopez*, *supra*,

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<sup>13</sup>See p.13, *supra*.

<sup>14</sup>In this connection, *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), can be distinguished and plaintiffs' reliance on it is misplaced.

<sup>15</sup>See Complaint, paragraph 91.

because, first, the Tax is not for the purpose of impeding travel. Rather, one of its stated purposes is to promote tourism which inherently means travel. Secondly, the Tax is not limited to nonresidents; indeed, all hotel patrons are subject to the Tax irrespective of their actual residence. See *Miami Dolphins v. Metropolitan Dade County*, 394 So.2d 981 (Fla. 1981).

*United Building and Construction Trades Council of Camden County and Vicinity v. Mayor of Camden*, 465 U.S. 208, 104 S.Ct. 1020 (1984), is distinguishable from the instant action and plaintiffs' reliance on it is misplaced. In *United Building*, *supra*, the United States Supreme Court held that the Privileges and Immunities Clause was violated, finding that the ordinance did distinguish between out-of-state citizens and some New Jersey residents, who happened to reside in Camden. In the present case, there is no such distinction. The Tax must be paid not only by hotel patrons who reside out-of-state, but also by hotel patrons who reside in Pennsylvania. As distinguished from the ordinance in *United Building*, the Tax here does not treat out-of-state citizens differently from citizens residing in Pennsylvania.

In summary, application of the tests enumerated in *Soto-Lopez*, *supra*, to this case leads to the conclusion that this Tax does not implicate improperly the right to travel and does not, therefore, violate the Privileges and Immunities Clause of the United States Constitution.

#### CONCLUSIONS OF LAW

1. The Act and the Tax do not violate the Equal Protection and Due Process Clause of the United States Constitution.
2. The Act and the Tax do not violate the Commerce Clause of the United States Constitution.
3. The Act and the Tax do not violate the Privileges and Immunities Clause of the United States Constitution.
4. The Act and the Tax are Constitutional under both the United States and the Pennsylvania Constitutions.

**PENNSYLVANIA CONVENTION CENTER AUTHORITY ACT**  
**Act of June 27, 1986, P.L. 267, No. 70, § 1 et seq.,**  
**PA STAT. ANN. tit. 53 § 16201 et seq. (Purdon Supp. 1990)**

**§16201. Short title**

This Act shall be known and may be cited as the Pennsylvania Convention Center Authority Act.

**§16202 Findings and declaration of policy**

It is hereby determined and declared as a matter of legislative finding:

(1) That the health, safety and general welfare of the people of this Commonwealth are directly dependent upon the continual encouragement, development, growth and expansion of business, industry, commerce and tourism within this Commonwealth.

(2) That unemployment, the spread of indigency, and the heavy burden of public assistance and unemployment compensation can be avoided by the promotion, attraction, stimulation, development and expansion of business, industry, commerce and tourism in this Commonwealth.

(3) That development of a major convention center is most appropriate in a city of the first class which, because of size, is capable of attracting major national conventions, and that the attraction of business to this Commonwealth as a result of such development is an important factor in the continual encouragement, promotion, attraction, stimulation, development, growth and expansion of business, industry, commerce and tourism within such a city, the surrounding counties and this Commonwealth as a whole.

(4) That the purpose of such a convention center should be the promotion, attraction, stimulation, development and expansion of business, industry, commerce and tourism in such a city, the surrounding counties and this Commonwealth as a whole.

(5) That the development of such a convention center will provide benefits to the hotel industry throughout the entire area of such a city where such a center is developed.

(6) That the development of such a convention center will also provide benefits to the restaurant and entertainment industries throughout the entire area of such city where such a center is located, to all other businesses and individuals benefited by the attraction of major conventions and tourists, to other individual businesses whose livelihood is dependent thereon and to the general public.

(7) That the need for the type of facility and the promotion thereof which will provide significant benefits to the general public will require the expenditure of public money and that it is therefore appropriate to authorize such a city to impose and collect a tax, applicable within the entire territorial limits of such city, to facilitate the development of a convention facility and the promotion of tourism within such cities.

(8) That, to promote the development of such a convention center within this Commonwealth, it is necessary to provide additional and flexible means of developing, constructing, designing, managing, financing and operating such a convention center.

(9) That an important aspect of the development of such a convention center should be the removal of blighted areas and the redevelopment thereof.

Therefore, it is hereby declared to be the policy of this Commonwealth to promote the health, safety, employment, business opportunities and general welfare of the people thereof by providing for the creation of a convention center authority which shall exist and operate as a public instrumentality of this Commonwealth for the public purpose of promoting, attracting, stimulating, developing and expanding business, industry, commerce and tourism in this Commonwealth. Such purpose is hereby declared to be a public purpose supporting the enactment of all provisions of this act and for which public money may be spent, taxes may be imposed and private property may be acquired by the exercise of the power of eminent domain.

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### **§16223. Hotel room rental tax**

**(a) Definitions.**--In addition to the definitions provided by section 3, the following words and phrases when used in this section shall have the meanings to them given in this section unless the context requires otherwise:

**"Consideration."** Receipts, fees, charges, rentals, leases, cash, credits, property of any kind or nature, or other payment received by the operators in exchange for or in consideration of the use or occupancy by a transient of a room or rooms in a hotel for any temporary period.

**"Hotel."** A hotel, motel, guesthouse or other building located within the city which holds itself out by any means, including advertising, license, registration with any innkeeper's group, convention listing association, travel publication or similar association or with any government agency, as being available to provide overnight lodging or use of facility space for consideration to persons seeking temporary accommodation; any place which advertises to the public at large or any segment thereof that it will provide beds, sanitary facilities or other space for a temporary period to members of the public at large; and any place recognized as a hostelry, provided that portions of such facility which are devoted to persons who have established permanent residence shall not be included in this definition.

**"Occupancy."** The use or possession or the right to the use or possession by any person other than a permanent resident of any room in a hotel for any purpose or the right to the use or possession of the furnishings or to the services accompanying the use and possession of the room.

**"Operator."** Any individual, partnership, nonprofit or profit-making association or corporation or other person or group of persons who maintain, operate, manage, own, have custody of, or otherwise possess the right to rent or lease overnight accommodations in any hotel to the public for consideration.

**"Patron."** Any person who pays the consideration for the occupancy of a room or rooms in a hotel.

**"Permanent resident."** Any person who has occupied or has the right to occupy any room or rooms in a hotel as a patron or otherwise for a period exceeding 30 consecutive days.

**"Room."** A space in a hotel set aside for the use and occupancy by patrons, or otherwise, for consideration, having at least one bed or other sleeping accommodations provided therein.

**"Temporary."** A period of time not exceeding 30 consecutive days.

**"Tourist promotion agency."** The agency designated by the council of the city in which the convention center is located to be eligible for grants from the Department of Commerce pursuant to the act of April 28, 1961 (P.L. 111, No. 50), known as the Tourist Promotion Law.

**"Transaction."** The activity involving the obtaining by a transient or patron of the use or occupancy of a hotel room from which consideration emanates to the operator under an express or an implied contract.

**"Transient."** Any individual who obtains an accommodation in any hotel for himself by means of registering at the facility for the temporary occupancy of any room for the personal use of that individual by paying to the operator of the facility a fee in consideration therefor.

**(b) Imposition of tax.**--The council of the city in which the convention center is located is hereby authorized to impose an excise tax on the consideration received by each operator of a hotel within the city from each transaction of renting a room or rooms to accommodate transients. The tax shall be collected by the operator from the patron of the room and paid over to the city pursuant to subsection (c) and shall be known as the Hotel Room Rental Tax.

**(c) Rate of tax.**--The rate of tax imposed under this section by the council of the city in which the convention center is located shall not exceed:

- (1) three percent on the effective date of this act;
- (2) five percent effective July 1, 1986;
- (3) six percent effective 30 days after the substantial completion of the main convention area; and



(4) in the event that construction of the main convention center proper is not commenced by December 31, 1988, the maximum rate of tax shall be 3% subject to the terms and conditions of subsection (d).

The total rate of tax imposed pursuant to this section and section 202 of Article II of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, shall not exceed 12%. In the event the rate imposed pursuant to section 202 of Article II of the Tax Reform Code of 1971 shall exceed 6% and the rate of tax imposed pursuant to this section shall have reached 6%, the rate of tax imposed pursuant hereto shall be reduced in order that the aggregate tax rate not exceed 12%.

(d) **Distribution of tax revenues.**--There shall be annually deposited in a special fund, established pursuant to subsection (e), for the use of tourist promotion agencies for tourist promotion activities, 100% of all revenues to be received from taxes imposed pursuant to this section prior to July 1, 1986. Thereafter, there shall be annually deposited in the special fund, established pursuant to subsection (e), for the use of tourist promotion agencies for tourist promotion agency activities:

(1) Sixty percent of all revenues received from taxes imposed pursuant to this section for the fiscal year of the city commencing July 1, 1989, until the next fiscal year of the city following the substantial completion of the main convention area.

(2) Forty-one and two-thirds percent of all revenues received pursuant to this section for the next fiscal year of the city commencing after the substantial completion of the main convention area and each fiscal year thereafter ending prior to July 1, 1999.

(3) Thirty-three and one third percent of all revenues received pursuant to this section for the fiscal year of the city commencing on or after July 1, 1999 and each fiscal year thereafter ending prior to July 1, 2010.

(4) Twenty-nine and one hundred and sixty-six on thousandths percent of all revenues received pursuant to this section for the fiscal year of the city commencing on or after



July 1, 2010 and each fiscal year thereafter ending prior to July 1, 2015.

(5) Twenty-five percent of all revenues received pursuant to this section for the fiscal year of the city commencing July 1, 2015, and thereafter.

The balance of revenues to be received from taxes imposed pursuant to this section shall be deposited annually in the special fund, established pursuant to subsection (e), for the use of the authority for convention center purposes, provided that notwithstanding the other provisions of this subsection, in the event that construction of the main convention area is not commenced by December 31, 1988, all revenues received pursuant to this section for the period after December 31, 1988, shall be used for tourist promotion agency purposes.

**(e) Deposit.**--The tax collector of each city electing to impose the tax authorized under this section is hereby directed to collect the tax and to deposit the revenues received from the tax in special funds established for purposes set forth herein. Interest on moneys deposited in the funds shall accrue proportionately to the respective funds as provided herein. The tax collector is hereby authorized to establish rules and regulations concerning the collection of the tax.

**(f) Expenditures.**--Expenditures from the funds established pursuant to subsection (e) for the tourist promotion agency shall be used by the designated tourist promotion agency for:

(1) advertising and publicizing tourist attraction in the area served by the agency;

(2) promoting and attracting conventions, exhibitions and other functions to utilize facilities in the area served by the agency;

(3) promoting and otherwise encouraging the use of the facilities in the area served by the agency by the public as a whole; and

(4) costs associated with the development and operation of the convention center.

Expenditures for convention center purposes.--Expenditures from the fund established pursuant to subsection (g) for the authority shall be used by the authority for the following uses:

(1) Projected annual debt service or lease payments of the convention center authority.

(2) Costs associated with financing, construction, improving, maintaining, furnishing, fixturing and equipping the convention center.

(3) Costs associated with the development of the convention center, including but not limited to, design, engineering and feasibility costs.

(4) Costs associated with the operation and management of the convention center.

(5) Costs associated with promoting, marketing and otherwise encouraging use of the convention center.

(6) General purposes of the convention center.

**(h) Pledge to bondholders.**--If and to the extent that the authority pledges its share of the proceeds of the tax authorized by this section as security for the payment of bonds issued by the authority for convention center purposes, the Commonwealth does hereby pledge to and agree with any person, firm or corporation subscribing to or acquiring bonds to be issued by the authority for convention center purposes that the Commonwealth itself will not, except to the extent provided in subsection (c), nor will it authorize any city to, reduce the rate of tax imposed for convention center purposes until all bonds so secured by the pledge of the authority, together with the interest thereon, are fully met and discharged.

**(i) Tax year.**--Each tax year for any tax imposed hereunder shall run concurrently with the city's fiscal year.

#### **§16224 Repeals**

**(a) Specific Repeal.**--The act of December 7, 1982 (P.L. 808, No. 226) known as the First Class City Hotel Room Rental Tax Act is repealed upon the effective date of any ordinance adopted by the council of the city in which the convention center is located enacting the tax authorized by section 23.

**(b) General.**--All acts and parts of acts are repealed insofar as they are inconsistent with this act.

## **HOTEL ROOM RENTAL TAX**

**PHILADELPHIA CODE, Chapter 19-2400.**

*as amended October 24, 1986*

### **§19-2401. Definitions.**

In this Chapter the following words and phrases shall have the meanings given to them in this Section unless the context clearly requires otherwise:

(1) "Authority" or "Pennsylvania Convention Center Authority." An agency and public instrumentality of this Commonwealth and a body politic and corporate created pursuant to the Act of June 27, 1986 (P.L. 267, No.70).

(2) "Consideration." Receipts, fees, charges, rentals, leases, cash, credits, property of any kind or nature, or other payment received by the operators in exchange for or in consideration of the use or occupancy by a transient of a room or rooms in a hotel for any temporary period.

(3) "Convention Center." Any land, improvement, structure, building, or part thereof, or property interest therein, whether owned by or leased by or to or otherwise acquired by the authority, appropriate for any of the following: large public assemblies, the holding of conventions, conferences, trade exhibitions, and other business, social, cultural, scientific and public interest events, and all facilities, furniture, fixtures and equipment necessary or incident thereto, including meeting rooms, dining rooms, kitchens, ballrooms, reception areas, registration and pre-function areas, truck loading areas (including access thereto), access ways, common areas, lobbies, offices, and areas appurtenant to any of the aforesaid (together hereinafter "Main Convention Area") and also including other buildings, structures or facilities for use in conjunction with the foregoing including, but not limited to, provision for off-street parking, retail areas and other improvements related to the center owned by or leased by or to the authority for the purpose of producing revenues to assist in defraying any costs or expenses of the convention center.

(4) "Department." The Department of Revenue of the City of Philadelphia.

(5) "Hotel." A hotel, motel, guesthouse or other building located within the city which holds itself out by any means, including advertising, license, registration with any innkeeper's group, convention listing association, travel publication or similar association or with any government agency, as being available to provide overnight lodging or use of facility space for consideration to persons seeking temporary accommodation; any place which advertises to the public at large or any segment thereof that it will provide beds, sanitary facilities or other space for a temporary period to members of the public at large; and any place recognized as a hostelry, provided that portions of such facility which are devoted to persons who have established permanent residence shall not be included in this definition.

(6) "Occupancy." The use or possession or the right to the use or possession by any person other than a permanent resident of any room in a hotel for any purpose or the right to the use or possession of the furnishings or to the services accompanying the use and possession of the room.

(7) "Operator." Any individual, partnership, nonprofit or profit-making association or corporation or other person or group of persons who maintain, operate, manage, own, have custody of, or otherwise possess the right to rent or lease overnight accommodations in any hotel to the public for consideration.

(8) "Patron." Any person who pays the consideration for the occupancy of a room or rooms in a hotel.

(9) "Permanent resident." Any person who has occupies or has the right to occupy any room or rooms in a hotel as a patron or otherwise for a period exceeding 30 consecutive days.

(10) "Room." A space in a hotel set aside for the use and occupancy by patrons, or otherwise, for consideration, having at least one (1) bed or other sleeping accommodations provided therein.

(11) "Substantial completion." Construction that is sufficiently completed in accordance with contract documents and certified by the convention center authority's architect or engineer, as modified by change orders which are subject to review and

approval by the Secretary of the Budget of the Commonwealth and the chief financial officer of the city, so that the main convention area can be used, occupied or operated for its intended use.

In no event shall a project be certified as substantially complete until at least ninety percent (90%) of the work on the main convention area is completed.

(12) "Temporary." A period of time not exceeding 30 consecutive days.

(13) "Tourist promotion agency." The agency designated by the council of the city in which the convention center is located to be eligible for grants from the Department of Commerce pursuant to the act of April 28, 1961 (P.L. 111, No. 50), known as the Tourist Promotion Law.

(14) "Transaction." The activity involving the obtaining by a transient or patron of the use or occupancy of a hotel room from which consideration emanates to the operator under an express or an implied contract.

(15) "Transient." Any individual who obtains an accommodation in any hotel for himself by means of registering at the facility for the temporary occupancy of any room for the personal use of that individual by paying to the operator of the facility a fee in consideration therefor.

#### **§19-2402. Imposition and Rate of Tax.**

(1) There is hereby imposed an excise tax on the consideration received by each operator of a hotel within the City from each transaction of renting a room or rooms to accommodate transients. The tax shall be collected by the operator from the patron of the room and paid over to the City pursuant to Sections 19-2403 and 19-2405 and shall be known as the Hotel Room Rental Tax.

(2) The rate of tax shall be:

(a) three percent (3%) on the effective date of this Chapter;

(b) five percent (5%) effective 12:01 A.M. of the eighth (8th) day following the effective date of this Chapter;



(c) six percent (6%) effective 30 days after the substantial completion of the main convention area; and

(d) in the event that construction of the main convention center proper is not commenced by December 31, 1988, the rate of tax effective January 1, 1989, and thereafter, shall be 3% subject to the terms and conditions of subsection 19-2403(2).

The total rate of tax imposed pursuant to this Section and section 202 of Article II of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971 shall not exceed 12%. In the event the rate imposed pursuant to section 202 of Article II of the Tax Reform Code of 1971 shall exceed 6%, and the rate of tax imposed pursuant to this section shall have reached 6%, the rate of tax imposed pursuant hereto shall be reduced in order that the aggregate tax rate not exceed 12%. effective the same date as any increase in tax imposed pursuant to Section 202 of Article II of the Tax Reform Code of 1971.

**§19-2403. Deposit and distribution of tax revenues.**

(1) The Department shall collect the tax from the operator and deposit the revenues received from the tax in special funds established for purposes set forth herein. Interest on moneys deposited in the funds shall accrue proportionately to the respective funds as provided herein. The Department is hereby authorized to establish rules and regulations concerning the collection of the tax.

(2) There shall be annually deposited in a special fund, established pursuant to Subsection (1), for the use of tourist promotion agencies for tourist promotion activities, 100% of all revenues to be received from taxes imposed pursuant to this Section prior to 12:01 A.M. of the eighth (8th) day following the effective date of this Chapter. Upon the effective date of this Chapter, there shall be deposited in a special fund, established pursuant to Subsection (1), for the use of tourist promotion agencies for tourist promotion agency activities:

(a) Sixty percent (60%) of all revenues received from taxes imposed pursuant to this Section for the fiscal year of the City commencing July 1, 1989, until the next fiscal year of the city

following the substantial completion of the main convention area.

(b) Forty-one and two-thirds percent (41-2/3%) of all revenues received pursuant to this Section for the next fiscal year of the City commencing after the substantial completion of the main convention area and each fiscal year thereafter ending prior to July 1, 1999.

(c) Thirty-three and one third percent (33-1/3%) of all revenues received pursuant to this Section for the fiscal year of the City commencing on or after July 1, 1999 and each fiscal year thereafter ending prior to July 1, 2010.

(d) Twenty-nine and one hundred and sixty-six on thousandth percent (29.166%) of all revenues received pursuant to this Section for the fiscal year of the City commencing on or after July 1, 2010, and each fiscal year thereafter ending prior to July 1, 2015.

(e) Twenty-five percent (25%) of all revenues received pursuant to this section for the fiscal year of the City commencing July 1, 2015, and thereafter.

The balance of revenues to be received from taxes imposed pursuant to this Section shall be deposited annually in a special fund, established pursuant to Subsection (1), for the use of the authority for convention center purposes, provided that, notwithstanding the other provisions of this Chapter, in the event that construction of the main convention area is not commenced by December 31, 1988, all revenues received pursuant to this Chapter for the period after December 31, 1988, shall be used for tourist promotion agency purposes.

#### **§19-2404. Expenditures from funds.**

(1) Expenditures from the funds established pursuant to Section 19-2403 for the tourist promotion agency shall be used by the designated tourist promotion agency for:

(a) advertising and publicizing tourist attraction in the area served by the agency;

(b) promoting and attracting conventions, exhibitions and other functions to utilize facilities in the area served by the agency;



(c) promoting and otherwise encouraging the use of the facilities in the area served by the agency by the public as a whole; and

(d) costs associated with the development and operation of the convention center.

(2) Expenditures from the fund established pursuant to Section 19-2403 for convention center authority purposes shall be used by the authority for the following uses:

(a) Projected annual debt service or lease payments of the convention center authority.

(b) Costs associated with financing, constructing, improving, maintaining, furnishing, fixturing and equipping the convention center.

(c) Costs associated with the development of the convention center, including, but not limited to, design, engineering and feasibility costs.

(d) Costs associated with the operation and management of the convention center.

(e) Costs associated with promoting, marketing and otherwise encouraging use of the convention center.

(f) General purposes of the convention center.

#### **§19-2405. Reports, Returns, Payment and Collection of Tax.**

(1) All taxes collected by any operator in accordance with this Chapter shall constitute a trust fund for the City and such trust shall be enforceable against such person and any person receiving any part of such fund without consideration, or knowing that the operator is committing a breach of trust; provided, however, that any person receiving payment of a lawful obligation of the operator from such fund shall be presumed to have received the same in good faith and without any knowledge of the breach of trust.

(2) The operator shall collect the tax imposed by this Chapter from the patron of the room and pay it over to the City as provided hereinafter. The operator, if he fails to collect the tax or pay it to the City when due, shall be liable to the City for the payment of the tax to the Department as provided in this Section.

(3) Every report and return shall be made upon a form furnished by the Department.

(4) Every operator shall transmit to the Department, on or before the twenty-fifth (25th) day of each month, a return for the month preceding the month in which the return is made, which return shall report the amount of consideration received for the transactions during the month for which the return is made, the amount of tax due from the operator for that month, and such other information as the Department may require.

(5) Every operator, at the time of filing every return required by this Section shall compute and pay to the Department the taxes shown as due on the return for the period for which the return is made.

(6) Every operator shall maintain records, which shall be made available to the Department upon its request, which shall include, but not be limited to, the number of transactions in each hotel reflected on an hourly, daily, or weekly basis, the rate(s) charged for each occupancy, the consideration received from all transaction during the month for which each return is made, as well as such other information as the Department may require.

(7) The tax due pursuant to this Chapter shall be collected and paid over to the City as though it were a continuation of the tax imposed by prior Chapter 19-2400, enacted pursuant to the act of December 7, 1982 (P.L. 808, No. 220), known as the First Class City Hotel Room Rental Tax Act, which act, in accordance with the provisions of Section 24 of the Pennsylvania Convention Center Authority Act, June 27, 1986 (P.L. 267, No. 70), shall be repealed on the effective date of this Chapter.

(8) If an operator enters the business of renting of hotel rooms subsequent to the effective date of this Chapter, the first return shall be filed on the twenty-fifth (25th) day of the first month subsequent thereto. The first return and tax payment due shall be for all transactions occurring during the preceding month based upon the actual taxable transactions during the preceding month.

# **COMPLAINT FOR DECLARATORY JUDGMENT**

## **CLASS ACTION**

*[Filed December 1, 1987. Caption omitted in printing.]*

Plaintiffs, by their attorneys, as and for their Complaint against the Defendants named herein, aver as follows:

### **NATURE OF PROCEEDING**

1. This is an action under Title 42 U.S.C. §1983, and Title 42 P.S. §§ 7531 *et seq.*, for a declaratory judgment declaring that the provisions of the Philadelphia Hotel Room Rental Tax Ordinance and the state enabling legislation which authorize and mandate the collection of a 2% excise tax dedicated to the Pennsylvania Convention Center Authority pending completion of an operational convention center are unconstitutional, on grounds that said tax constitutes a taking of property without due process of law; establishes an arbitrary classification impermissible under the Equal Protection Clause; and contravenes the Interstate Commerce Clause of the United States Constitution.

### **DESCRIPTION OF NAMED PARTIES**

2. Defendant Pennsylvania Convention Center Authority (hereinafter referred to as the "Authority") is an agency and public instrumentality of the Commonwealth of Pennsylvania established pursuant to the Act of June 27, 1986, P.L. 267 No. 70, 53 P.S. §§ 16201-16224, for the purpose of planning, constructing and administering a new convention center in the City of Philadelphia.

3. Defendant The City of Philadelphia is a municipal corporation and the only city of the first class in the Commonwealth of Pennsylvania.

4. The Department of Revenue of the City of Philadelphia, is the department of the City of Philadelphia responsible for: regulating the collection of the Philadelphia Hotel Room Rental Tax by hotel operators from hotel guests; collection of said tax from hotel operators; and payment to the Authority of the portion of the tax dedicated to its use.

5. Plaintiff Linda Paustian is an individual and a citizen of the Commonwealth of Pennsylvania who resides at 321 Catherine Street, Philadelphia, Pennsylvania.

6. Plaintiff John Famularo is an individual and a citizen of the Commonwealth of Pennsylvania who resides at 1420 Locust Street, Philadelphia, Pennsylvania.

7. Plaintiffs Paustian and Famularo are participants in the Liberty Forum, an unincorporated association of residents of the Delaware Valley who meet on a monthly basis in Philadelphia, Pennsylvania, to hear presentations by prominent experts in economics and related disciplines who support libertarian principles. Liberty Forum is supported by voluntary contributions, and depends upon its participants to sponsor programs by paying the speaker's honorarium and/or expenses, including hotel lodging in Philadelphia.

8. Plaintiff John Fund is an individual and a citizen of the state of New Jersey who resides at 250 First Street, Jersey City, New Jersey.

9. On or about October 23, 1987, Plaintiff Fund traveled from New York City, New York, where he is employed as an editor of the Wall Street Journal, to Philadelphia, Pennsylvania, for the purpose of speaking to the Liberty Forum on the subject of media bias. Plaintiff Fund reserved a room at the Holiday Inn Center City, at 1800 Market Street, Philadelphia, Pennsylvania, for overnight lodging in connection with this trip.

10. Plaintiff Paustian, as a co-sponsor of the October, 1987 Liberty Forum meeting, reimbursed Plaintiff Fund's hotel bill, including the Philadelphia Hotel Room Rental Tax portion of the bill.

11. On or about November 16, 1987, David Boaz traveled from Washington, District of Columbia, where he is employed as Vice President of Cato Institute, to Philadelphia, Pennsylvania, for the purpose of speaking to the Liberty Forum on the subject of the 1988 presidential campaign. Mr. Boaz reserved a room at the Hershey Hotel, Broad and Locust Streets, Philadelphia, Pennsylvania, for overnight lodging in connection with this trip.

12. Plaintiff Paustian, as a cosponsor of the November, 1987 Liberty Forum meeting, reimbursed Mr. Boaz's hotel bill, including the Philadelphia Hotel Room Rental Tax portion of the bill.

13. On or about September 22, 1987, Dr. John Williams traveled from Irvington-on-Hudson, New York, where he is employed as a visiting professor at the Foundation for Economic Education, Inc., to Philadelphia, Pennsylvania, for the purpose of speaking to the Liberty Forum on the subject of the changing economic outlook of Socialist governments around the world. Dr. Williams reserved a room at the Holiday Inn, 13th and Walnut Streets, Philadelphia, Pennsylvania, for overnight lodging in connection with this trip.

14. Plaintiff Famularo, as a co-sponsor of the September, 1987 Liberty Forum meeting, reimbursed Dr. Williams' hotel bill, including the Philadelphia Hotel Room Tax portion of the bill.

15. On December 15, 1987, a meeting of the Liberty Forum is scheduled which will feature an out-of-state speaker. Plaintiff Famularo has agreed to reimburse the speaker's hotel bill for lodging in connection with that meeting.

16. Plaintiff Richard Broglino is an individual and a citizen of the Commonwealth of Massachusetts who resides at 8 Maureen Road, Lexington, Massachusetts.

17. Plaintiff Broglino is in the business of providing construction management and consulting services to real estate developers and, in the course of said business, has in the past, and anticipates that in the future he will, stay overnight in Philadelphia in a hotel room which is subject to the Philadelphia Hotel Room Rental Tax, between November 1, 1986 and the date the proposed new convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

18. Plaintiff Broglino rarely, if ever, attends conventions, and does not expect to benefit from the construction of a new convention center in Philadelphia, Pennsylvania.

19. Plaintiff Stuart Kessler is an individual and a citizen of the State of New York who resides at 21 East 79th Street, New York, New York.

20. Plaintiff Kessler is an architect who, in the course of his work, has in the past, and anticipates that in the future he will, stay overnight in Philadelphia in a hotel room which is subject to the Philadelphia Hotel Room Rental Tax, between November 1, 1986 and the date the proposed convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

21. Plaintiff Kessler rarely, if ever, attends conventions, and does not expect to benefit from the construction of a new convention center in Philadelphia, ~~Pennsylvania~~.

#### CLASS ACTION ALLEGATIONS

##### Class A

22. Plaintiffs Fund, Broglio and Kessler bring this action on their own behalf and, under the provisions of Rule 1702 of the Pennsylvania Rules of Civil Procedure, on behalf of all other persons similarly situated, members of the class herein defined as "Class A", which consists of:

All non-residents of Pennsylvania who have, or in the future will, stay overnight in a hotel room subject to the Philadelphia Hotel Room Rental Tax, in the course of their interstate travel and/or participation in interstate commerce, between November 1, 1986 and the date the proposed new convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

23. There are at least thousands of members of the above described class; their exact number and identities are unknown to Plaintiffs.

24. The members of Class A are so numerous that joinder of all members is impracticable.



25. There are questions of law and fact common to the members of Class A, which relate to the constitutionality of the Philadelphia Hotel Room Rental Tax on its face or as applied to members of Class A.

26. Plaintiffs are members of Class A, and their claims are typical of the claims of the members of Class A.

27. Plaintiffs will fairly and adequately represent the interests of the members of Class A.

28. A class action provides a fair and efficient method for adjudication of the controversy in that only declaratory relief is sought, and the tax is generally applicable to the members of Class A, thereby making appropriate final declaratory relief with respect to the class as a whole.

#### **Class B**

29. Plaintiffs Paustian and Famularo and bring this action on their own behalf and, under the provisions of Rule 1702 of the Pennsylvania Rules of Civil Procedure, on behalf of all other persons similarly situated, members of the class herein defined as "Class B", which consists of:

All natural persons and entities, including Pennsylvania residents, who, in the course of their participation in interstate commerce, have, or in the future will, pay or reimburse the expenses of lodging a nonresident of Pennsylvania at a hotel subject to the Philadelphia Hotel Room Rental Tax between November 1, 1986 and the date the proposed convention center becomes operational, or the date the portion of the said tax dedicated to the Authority for convention center purposes is eliminated, whichever is sooner.

30. There are at least hundreds of members of Class B; their exact number and identities are unknown to Plaintiffs.

31. The members of Class B are so numerous that joinder of all members is impracticable.

32. There are questions of law and fact common to the members of Class B, which relate to the constitutionality of

the Philadelphia Hotel Room Rental Tax on its face or as applied to members of Class B.

33. Plaintiffs Paustian, and Famularo are members of Class B and their claims are typical of the claims of the members of Class B.

34. Plaintiffs will fairly and adequately represent the interests of the members of Class B.

35. A class action provides a fair and efficient method for adjudication of the controversy in that only declaratory relief is sought, and the tax is generally applicable to the members of Class B, thereby making appropriate final declaratory relief with respect to the class as a whole.

#### **STATEMENT OF FACTS**

##### **Background of Market East Convention Center Proposal**

36. For at least a decade, city officials and concerned citizens of the City of Philadelphia have been considering whether it would be in the interest of the City to build a major new Convention Center, or undertake a major renovation of the City-owned convention center complex known as the "Civic Center".

37. In 1983 the City of Philadelphia commissioned the accounting firm of Pannell, Kerr, Forster (hereinafter "PKF") to study the need for a new or renovated convention.

38. The PKF study recommended construction of a new convention center characterized as a "World Class Convention Center"; that is, a center large enough to accommodate the biggest national conventions (i.e. the Democratic National Convention) and the most extensive trade shows.

39. Rejecting several alternative proposals, the Philadelphia Industrial Development Corporation ("P.I.D.C.") and a specially appointed site selection committee recommended construction of the proposed new convention center on a site bounded by 11th, 13th, Arch and Race Streets, incorporating the old Reading Terminal train shed as an elaborate atrium-like entrance to the exhibit hall. The plans called for an exhibit hall of approximately 330,000 square feet of exhibit space, a 30,000 square foot ballroom, 91,000 square feet of various

meeting rooms, and 363 parking spaces, retail shops and approximately 100,000 square feet of street level area available for use as exhibit space in the future. The proposed convention center plan set forth above is hereinafter referred to as the "Reading Convention Center".

40. As an essential adjunct to the Reading Convention Center, a headquarters hotel adjacent to the main convention facility is included as part of the plan.

41. In October, 1984, the Council of the City of Philadelphia approved several ordinances authorizing the Philadelphia Redevelopment Authority to proceed with land acquisition for the Reading Convention Center.

42. As originally conceived, the project was to be a public/private venture, with the Reading Corporation participating as co-sponsor and developer.

43. The 1983 budget for the Reading Convention Center estimated that the project would cost approximately three hundred and two million dollars (\$302,000,000), with private investors providing thirty-six million five hundred thousand dollars (\$36,500,000), the state of Pennsylvania contributing one hundred and fifty million dollars (\$150,000,000), and the City, the United States Department of Housing and Urban Development and industrial revenue bond proceeds providing the balance.

44. As a result of the reluctance of the Commonwealth of Pennsylvania to authorize the expenditure of state funds to support the project as a public/private venture, in April, 1985, Richard Thornburgh, then Governor of Pennsylvania, and W. Wilson Goode, Mayor of Philadelphia, agreed that the convention center would be a purely public project, developed, planned, constructed, owned and administered by a Convention Center Authority, the board of which was to be appointed by various City and Commonwealth officials.

45. Under this plan, once the Convention Center was operational, the Authority would lease it to the City, and the City would be responsible, through its lease payment, to meet the annual debt service on the bonds issued for the Center's construction, as well as providing all necessary working capital and funding its operating losses.

46. The plan also called for an increase in the Philadelphia Hotel Room Rental Tax, the proceeds of which would be applied to off-set the City's obligation to support the debt service and operating losses of the Convention Center.

47. On or about January 17, 1986 the City Administration released a new financing plan for the Reading Convention Center, which estimated the total cost of the project to be approximately four hundred and fifty five million dollars (\$455,000,000.00), to be financed as follows:

Bond Proceeds	\$175,661,000
State Grant	185,000,000
City Grant	10,000,000
Fund Earnings	28,532,000
City Operating	39,900,000
Hotel Taxes	15,654,000
TOTAL	\$454,997,000

48. The January 17, 1986 financing plan assumed that the bonds would be tax exempt and dated June 1, 1987; that the hotel tax for the benefit of the project would begin to be collected in 1986, and the tax proceeds would be used to pay Authority operating expenses and construction costs; that construction would start on or before February 1, 1987; and that the project would be completed within three years of the start of construction (on or before February 1, 1990).

49. On or about June 27, 1986, the Pennsylvania Legislature passed, and the Governor signed into law, the Pennsylvania Convention Center Authority Act, 53 P.S. §16201, *et seq.* (hereinafter referred to as the "Convention Center Act").

50. Section 2 of the Convention Center Act finds that the development of a major convention center in Philadelphia will promote the health, safety, employment, business opportunities and general welfare of the people of Pennsylvania, and declares that such public purpose supports the enactment of all the provisions of the Act and is a purpose for which public money may be spent, taxes imposed and private property may be acquired by the exercise of eminent domain.

51. Section 4 of the Convention Center Act creates the Pennsylvania Convention Center Authority (the "Authority")

as a public authority and governmental instrumentality for the purpose of developing and owning, maintaining and operating a convention center.

52. Section 23 of the Convention Center Act authorizes the City of Philadelphia to revise the existing Hotel Room Rental Tax, to increase the tax rate and apportion the revenue between the Philadelphia Convention and Visitors Bureau (hereinafter referred to as "PCVB"), then the exclusive recipient of the revenue generated by this tax, and the Authority.

#### **The Convention Center Tax**

53. On or about October 16, 1986, Philadelphia City Council, acting pursuant to the provisions of Section 23 of the Convention Center Act, adopted a Hotel Room Rental Tax Ordinance (Phila. Code §19-2400, *et seq.*) which repealed the existing Hotel Room Rental Tax; adopted a revised Hotel Room Rental Tax which increased the tax rate from 3% to 5% effective on or about November 1, 1986; dedicated the increase (2% of the room charge) to the Authority for convention center purposes; and provided for the subsequent adjustments in the tax rate and reallocation of the tax revenue, in accordance with the provisions of the state enabling legislation. The portion of the Philadelphia Hotel Room Rental Tax dedicated to the Authority for convention center purposes is hereinafter referred to as the "Convention Center Tax".

54. Pennsylvania law imposes a 6% state excise tax, comparable to the state sales tax, on the consideration received for the rental of hotel rooms throughout the Commonwealth.

55. As a result of the combined effect of the state hotel tax and the revised Philadelphia Hotel Room Rental Tax, a person renting a hotel room in Philadelphia and not otherwise exempt is required to pay a cumulative excise tax on the consideration for the room of 11%, which consists of a 6% tax for the general purposes of the Commonwealth, a 3% city tax dedicated to PCVB, to be used to promote tourism and attract conventions to the City, and an additional 2% (the Convention Center Tax) dedicated to the Authority, to be



used for the planning, development and construction of the Reading Convention Center.

56. The Philadelphia Hotel Room Rental Tax Ordinance, in accordance with §23 of the Convention Center Act, provides that the tax rate will automatically increase from 5% to 6% thirty days after substantial completion of the main convention area, providing that the total hotel room tax, including the state hotel tax, does not exceed 12%.

57. The Philadelphia Hotel Room Rental Tax Ordinance, in accordance with §23 of the Convention Center Act, also provides that the Convention Center Tax portion of the revenue derived from the Philadelphia Hotel Room Rental Tax will increase from 40% to 58 1/3% following substantial completion of the main convention area, and continue to increase at stated intervals until it reaches 75% as of July 1, 2015.

58. The Philadelphia Hotel Room Rental Tax Ordinance, in accordance with §23 of the Convention Center Act, also provides that the Convention Center Tax will be eliminated, and the Hotel Room Rental Tax will automatically return to a 3% tax for the benefit of PCVB effective January 1, 1989, in the event that construction of the main convention center proper is not commenced by December 31, 1988.

59. The City of Philadelphia is located in the Southeastern corner of Pennsylvania, within a relatively short distance of New Jersey, Delaware, Maryland and New York. Philadelphia is served by an international airport, an international marine port on the Delaware River, interstate rail lines, and a network of interstate

60. As a center of business, education and medical science, Philadelphia attracts visitors from all parts of the United States, as well as foreign countries.

61. As the birthplace of the nation, replete with historical buildings and landmarks, Philadelphia attracts tourists from all parts of the United States as well as foreign countries.

62. The vast majority of individuals who rent or occupy overnight accommodations at hotels located in Philadelphia,



Pennsylvania, are citizens of states or territories of the United States, other than Pennsylvania.

63. A small proportion of the individuals who occupy overnight accommodations at hotels located in Philadelphia, Pennsylvania, are foreign nationals.

64. A small proportion of the individuals who occupy overnight accommodations at hotels located in Philadelphia, Pennsylvania, are Pennsylvania residents.

65. The Philadelphia Hotel Room Rental Tax does not apply to rental or occupancy of a hotel room by a "permanent resident", defined as a person who has occupied or has the right to occupy any room or rooms in a hotel for a period exceeding thirty consecutive days.

66. The vast majority of persons who are exempt from the Philadelphia Hotel Room Rental Tax because they qualify as "permanent residents" are residents of Pennsylvania.

67. A small proportion (about 11%) of the persons who occupy hotel rooms in Philadelphia, Pennsylvania are present in the state to attend conventions, trade shows, or other meetings of fifty or more persons.

68. The vast majority of the persons referred to in paragraph 67 above are attending meetings or conventions held in private hotel facilities, which meeting or conventions are too small to be held at a major convention center.

69. The vast majority of the events held at the existing Civic Center are regional shows and meetings, which do not generate significant hotel occupancy.

70. The Reading Convention Center will not generate significant hotel occupancy unless and until it is operational.

71. Nonresidents of Pennsylvania who patronize hotels located in Philadelphia, Pennsylvania prior to the time the Reading Convention Center is operational, as a group, have not and will not benefit from expenditures related to the planning, development and construction of the Reading Convention Center.

## **Application of Proceeds of the Convention Center Tax**

72. For the first eleven months from the effective date of the Convention Center Tax (November, 1986 through September, 1987) the City of Philadelphia Department of Revenue collected five million nine hundred and thirty-four thousand, three hundred and fifty-eight dollars (\$5,934,358.00) in Hotel Room Rental Tax, of which two million, three hundred and seventy-three thousand, seven hundred and forty three dollars (\$2,373,743.00) (that is, 40%) represented the Convention Center Tax.

73. The Board of Directors of the Authority was organized on or about October, 1986, under the leadership of Roger Hillas, Chairman of the Board.

74. In March, 1987, the Authority hired Frank Wright, a former aide to former Governor Thornburgh, as Executive Director at an annual salary of one hundred and fifteen thousand dollars (\$115,000.00).

75. Hillas resigned in August, 1987, as a result of pressure from Thornburgh's successor, Governor Casey, to replace Frank Wright.

76. In September, 1987, after six months of employment, Wright resigned, pursuant to an arrangement whereby the Authority agreed to pay him severance in the amount of one hundred and ninety thousand dollars (\$190,000.00).

77. On or about October 1, 1987, Willard G. Rouse, III was elected Chairman of the Board of the Authority, filling the vacancy created by Hillas' resignation.

78. The vacancy in the position of executive director has not been filled.

79. The Authority does not have a capital budget or an operating budget, even though the Convention Center Act requires the Authority to adopt, by majority vote of its board, a capital budget and an operating budget for the next fiscal year, at least 30 days before the end of its fiscal year (that is, on or before May 31 of each year).

80. There has been no public audit of the Authority although an audit is required by the Convention Center Act.

81. In October, 1986, P.I.D.C. again revised its financial projections and timetables for the Reading Convention Center. The revised financial projections increased the estimated cost of the project to approximately four hundred and seventy-six million dollars (\$476,000,000) and delayed the time table by one year, to project commencement of construction in 1988, and completion of the project in 1991.

82. The Commonwealth of Pennsylvania has committed a total of one hundred and eighty-five million dollars (\$185,000,000) of state funds to the project, which are to be used for site acquisition and demolition. The state legislation appropriating these funds restricts expenditure of more than forty-eight million dollars (\$48,000,000) of those funds until a firm commitment has been secured from a private developer for the construction of a headquarters hotel of major proportions to be constructed in the immediate vicinity of the convention center. As of the filing of this action no such commitment has been received.

83. Convention Center planners and the Philadelphia Redevelopment Authority had estimated that about thirty-nine million five hundred thousand (\$39,500,000) of the state funds allocated to the project would be used to purchase and clear the convention center hotel site in the 1200 block of Market Street.

84. On or about August 6, 1987, however, Commonwealth Budget Secretary Michael H. Hershock announced that he interpreted the state law as strictly prohibiting utilization of the state funds to support hotel development activities, including land acquisition. No other funds have been identified which are available for this purpose.

85. Since its formation in October, 1986 the Authority has hired staff and paid staff salaries of approximately six hundred thousand dollars (\$600,000.00), rented and renovated office space and purchased equipment and furniture.

86. The Authority has expended over five hundred thousand dollars (\$500,000.00) on fees paid to three law firms, consultants for an affirmative action plan, risk management (insurance), site investigation engineering, accounting, and an update of the PKF market study referred to in paragraphs 37

and 38 above. It has also contracted for additional consulting services.

87. The aforesaid expenditures have been made with funds derived from the proceeds of the Convention Center Tax.

88. Hotel patrons who are required to pay the Convention Center Tax, as a group, have not, and in the future will not, benefit from the aforesaid expenditures.

#### CAUSES OF ACTION

89. Pending commencement of operation of the Reading Convention Center, nonresidents of Pennsylvania who rent overnight accommodations in Philadelphia hotels will be taxed to support the planning and construction of the convention center without realizing any benefit from the existence of said convention center.

90. Consequently, the convention center tax, on its face or as applied to nonresidents of Pennsylvania who are required to pay the tax prior to the commencement of operation of the convention center, constitutes a taking of property without due process of law.

91. The Convention Center Tax imposes a burden upon interstate travel, a privilege and immunity of United States citizens.

92. There is no compelling state interest justifying the imposition of the Convention Center Tax.

93. There is no reasonable relationship between the class of persons who stay overnight in a Philadelphia hotel prior to the commencement of operation of the Reading Convention Center, and the class of persons who may ultimately attend conventions or trade shows at the Reading Convention Center once it becomes operational.

94. Consequently, the provisions of the Philadelphia Hotel Room Rental Tax which require nonresidents of Pennsylvania who rent rooms at Philadelphia hotels prior to the commencement of operation of the Reading Convention Center to pay for the planning and construction of that Convention Center, constituted an arbitrary classification and invidious discrimination which violates the Equal Protection

Clause of the Fourteenth Amendment of the United States Constitution.

95. The Convention Center Tax discriminates against nonresidents of Pennsylvania in that the tax is imposed upon persons who rent sleeping accommodations at Philadelphia hotels, the vast majority of whom are not Pennsylvania residents, and exempts persons who rent accommodations for thirty days or more, the vast majority of whom are residents.

96. The convention center tax imposes a burden on interstate commerce which is not justified by a related benefit.

97. To the extent that it may be determined that nonresidents of Pennsylvania receive any benefit from the expenditure of the Convention Center Tax revenue, that benefit is not proportionate to the burden imposed by the tax.

98. For the reasons set forth above, the Convention Center Tax violates the Interstate Commerce Clause of the United States Constitution.

WHEREFORE, Plaintiffs pray that this Honorable Court:

(a) Determine that this action may proceed as a class action on behalf of the members of Class A and Class B, as described herein;

(b) After hearing enter a declaratory Judgment declaring the Convention Center Tax portion of the Philadelphia Hotel Room Rental Tax, and the state enabling legislation, unconstitutional on its face or as applied to members of Class A and Class B pending completion and operation of the proposed convention center;

(c) Award Plaintiffs their reasonable counsel fees and costs;

(d) Award such other relief as the court may deem appropriate.

*[Signature line omitted in printing.]*